84-418

No. 84-

Supreme Court, U.S.
FILED
SEP 14 1984
ALEXANDER L. STEVAS
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

OAKLAND-ALAMEDA COUNTY COLISEUM, INC.,
Petitioner,

VS.

OAKLAND RAIDERS, LTD., and
LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

United States Court of Appeals

NINTH CIRCUIT

Nos. 82-5572 to 82-5574, 82-5664, 82-5665, 83-5714, 83-5732 and 83-5938
Argued and Submitted April 7, 1983
Decided Feb. 28, 1984

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff-Appellee,

v.

NATIONAL FOOTBALL LEAGUE,
an unincorporated association, et al.,
Defendants/Cross-Defendants Appellants/Cross-Appellees.

Before:

ANDERSON AND NELSON,
Circuit Judges,

and WILLIAMS,
*District Judge.**

Appeals from the United States District Court for the Central District of California.

J. BLAINE ANDERSON, *Circuit Judge:*

These appeals involve the hotly contested move by the Oakland Raiders, Ltd. professional football team from Oakland, California, to Los Angeles, California. We review only the liability portion of the bifurcated trial; the damage phase was concluded in May 1983 and is on a separate appeal. After a thorough review of the record and the law, we affirm.

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* The Honorable Spencer M. Williams, United States District Judge for the Northern District of California, sitting by designation.

I. FACTS

In 1978, the owner of the Los Angeles Rams, the late Carroll Rosenbloom, decided to locate his team in a new stadium, the "Big A," in Anaheim, California. That left the Los Angeles Coliseum without a major tenant. Officials of the Coliseum then began the search for a new National Football League occupant. They inquired of the League Commissioner, Pete Rozelle, whether an expansion franchise might be located there but were told that at the time it was not possible. They also negotiated with existing teams in the hope that one might leave its home and move to Los Angeles.

The L.A. Coliseum ran into a major obstacle in its attempts to convince a team to move. That obstacle was Rule 4.3 of Article IV of the NFL Constitution. In 1978, Rule 4.3 required unanimous approval of all the 28 teams of the League whenever a team (or in the parlance of the League, a "franchise") seeks to relocate in the home territory of another team. Home territory is defined in Rule 4.1 as

> the city in which [a] club is located and for which it holds a franchise and plays its home games, and includes the surrounding territory to the extent of 75 miles in every direction from the exterior corporate limits of such city . . . .

In this case, the L.A. Coliseum was still in the home territory of the Rams.

The Coliseum viewed Rule 4.3 as an unlawful restraint of trade in violation of § 1 of the Sherman Act, 15 U.S.C. § 1, and brought this action in September of 1978. The district court concluded, however, that no present justiciable controversy existed because no NFL team had committed to moving to Los Angeles. 468 F.Supp. 154 (C.D.Cal.1979).

The NFL nevertheless saw the Coliseum's suit as a sufficient threat to warrant amending Rule 4.3. In late 1978, the Executive Committee of the NFL, which is comprised of a voting member of each of the 28 teams, met and changed the

rule to require only three-quarters approval by the members of the League for a move into another team's home territory.[1]

Soon thereafter, Al Davis, managing general partner of the Oakland Raiders franchise, stepped into view. His lease with the Oakland Coliseum had expired in 1978. He believed the facility needed substantial improvement and he was unable to persuade the Oakland officials to agree to his terms. He instead turned to the Los Angeles Coliseum.

Davis and the L.A. Coliseum officials began to discuss the possibility of relocating the Raiders to Los Angeles in 1979. In January, 1980, the L.A. Coliseum believed an agreement with Davis was imminent and reactivated its lawsuit against the NFL, seeking a preliminary injunction to enjoin the League from preventing the Raiders' move. The district court granted the injunction, 484 F.Supp. 1274 (1980), but this court reversed, finding that an adequate probability of irreparable injury had not been shown. 634 F.2d 1197 (1980).

On March 1, 1980, Al Davis and the Coliseum signed a "memorandum of agreement" outlining the terms of the Raider's relocation in Los Angeles. At an NFL meeting on March 3, 1980, Davis announced his intentions. In response, the League brought a contract action in state court, obtaining an injunction preventing the move. In the meantime, the City of Oakland brought its much-publicized eminent domain action against the

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[1] Rule 4.3 originally read:

> Any transfer of an existing franchise to a location within the home territory of any other club shall only be effective if approved by a unanimous vote: any other transfer shall only be effective if approved by the affirmative vote of not less than three-fourths or 20, whichever is greater, of the member clubs of the League.

After its 1978 amendment, Rule 4.3 states:

> The League shall have exclusive control of the exhibition of football games by member clubs within the home territory of each member. No member club shall have the right to transfer its franchise or playing site to a different city, either within or outside its home territory, without prior approval by the affirmative vote of three-fourths of the existing member clubs of the League.

Raiders in its effort to keep the team in its original home. The NFL contract action was stayed pending the outcome of this litigation, but the eminent domain action is still being prosecuted in the California courts.

Over Davis' objection that Rule 4.3 is illegal under the antitrust laws, the NFL teams voted on March 10, 1980, 22-0 against the move, with five teams abstaining. That vote did not meet the new Rule 4.3's requirement of three-quarters approval.

The Los Angeles Memorial Coliseum Commission then renewed its action against the NFL and each member club. The Oakland-Alameda County Coliseum, Inc., was permitted to intervene. The Oakland Raiders cross-claimed against the NFL and is currently aligned as a party plaintiff.

The action was first tried in 1981, but resulted in a hung jury and mistrial. A second trial was conducted, with strict constraints on trial time. The court was asked to determine if the NFL was a "single business entity" and as such incapable of combining or conspiring in restraint of trade. Referring to the reasoning in its opinion written for the first trial, 519 F.Supp. 581, 585 (1981), the court concluded the League was not a "single entity." Vol. 12 Clerk's Record # 931.

The district court denied the NFL's motions for change of venue, but did employ a detailed voir dire of the jury pool and of the jurors eventually empaneled. The trial was bifurcated so the jury could first determine liability. In the liability portion, counsel were limited to 40 hours of trial time per side in an effort to narrow the matters presented.

The trial was conducted and witnesses called, including owners of various NFL member teams and the League Commissioner, Pete Rozelle. The jury was instructed on the antitrust liability issues and sent out May 6, 1982. On May 7, 1982, the jury returned a verdict in favor of the Los Angeles Memorial Coliseum Commission and the Oakland Raiders on the antitrust claim and for the Raiders on their claim of breach of the implied promise of good faith and fair dealing. The court then continued the case to September 20, 1982, to begin the damages trial.

On June 14, 1982, the court issued its judgment on the liability issues, permanently enjoining the NFL and its member clubs from interfering with the transfer of the Oakland Raiders' NFL franchise from the Oakland Coliseum to the Los Angeles Memorial Coliseum. The court determined, in addition, that there was "no just reason for delay in entering this final judgment on plaintiff's and cross-claimant's claim for declaratory and equitable relief, and . . . expressly direct[ed] this final judgment be entered." Vol. 16 Clerk's Record # 2090. The NFL and its original clubs immediately appealed the permanent injunction (No. 82-5572); the original clubs of the American Football League also appealed (No. 82-5573), as did the Los Angeles Rams Football Co. (No. 82-5574) and the Oakland-Alameda County Coliseum (No. 82-5664). The Oakland Raiders cross-appealed challenging six orders entered by the court in 1981 and 1982 (Nos. 82-5665 and 83-5398). The NFL and Oakland Coliseum have also appealed the failure of the district court to grant their post-trial motions. (Nos. 83-5714 and 83-5732).

The damages trial was completed in May 1983 with the jury returning a verdict awarding the Raiders $11.55 million and the Los Angeles Coliseum $4.86 million. These awards were trebled by the district court pursuant to 15 U.S.C. § 15. The NFL and the other defendants have appealed. (Nos. 83-5907, 83-5908 and 83-5909). This panel will hear and decide the damage appeals. But, because these appeals were expedited, the damage appeals will be decided in a later opinion after briefing, possible argument, and submission.[2]

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[2] Once in this court, the parties have continued their practice of affirmative lawyering and have filed multiple motions. The motions that have not been resolved up until this point are here discussed.

First, the NFL has moved this court for permission to supplement the record on the question of the effect of the stipulation entered into by the parties concerning relevant market. We grant the motion and will discuss the effect of the stipulation with the merits section, *infra*.

Second, the Raiders agreed to drop its cross-appeal if the judgment of antitrust liability and injunction is affirmed. As we are affirming that

(footnote continues)

II. SHERMAN ACT § 1

The jury found that Rule 4.3 violates § 1 of the Sherman Act, 15 U.S.C. § 1. Section 1 literally prohibits every agreement, conspiracy, or other concerted activity in restraint of trade. Since Congress could not have intended that courts invalidate "every" such agreement, *see United States* v. *Joint Traffic Assn.*, 171 U.S. 505, 19 S.Ct. 25, 43 L.Ed. 259 (1898), most restraints are analyzed under the so-called "rule of reason." *Standard Oil of New Jersey* v. *United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). The rule of reason requires the factfinder to decide whether under all the circumstances of the case the agreement imposes an unreasonable restraint on competition. *Arizona* v. *Maricopa County Medical Society*, 457 U.S. 332, 343, 102 S.Ct. 2465, 2472, 73 L.Ed. 48, 58 (1982).

Standard Oil, however, reconciled the earlier categorical prohibition with its own rule of reason by declaring that some restraints remain inherently unreasonable. 221 U.S. at 64-65, 31 S.Ct. at 517. When judicial experience with a particular kind of restraint enables a court to predict with certainty that the rule of reason will condemn that restraint, the court will hold that the restraint is per se unlawful. *See United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972). In other cases where judges lack the expert understanding of an industry's market structure and behavior to have such certainty, the court will consider facts peculiar to the industry, the nature of the restraint and its effect to determine

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(footnote continued)

judgment, we dismiss the Raiders' cross-appeals, Nos. 82-5665 and 83-5938. It is unnecessary to address the NFL's and Oakland Coliseum's motions on this subject.

Finally, the Raiders have moved to dismiss the NFL's and Oakland Coliseum's appeals from the district court's denial of their Fed.R.Civ.P. 60(b) motions. This motion is granted. The district court lacked jurisdiction to consider this motion: its denial of the motion is not an appealable order. *Smith* v. *Lujan*, 588 F.2d 1304, 1307 (9th Cir.1979). Also, the district court indicated no desire to entertain the motions if this court remanded this case back to it. *Id.* The appeals in Nos. 83-5714 and 83-5732 are dismissed.

whether that restraint promotes or restrains competition. *See Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238, 38 S.Ct. 242, 243. 62 L.Ed. 683, 687 (1918).

In the present case, the district judge found that the unique nature of the business of professional football made application of a per se rule inappropriate. 468 F.Supp. 154, 164-168 (1979). The court therefore instructed the jury that it was to decide whether Rule 4.3 was an unreasonable restraint of trade. The parties do not contest the appropriateness of this basic reasonableness inquiry. The NFL, however, raises two arguments against the lower court's judgment finding section 1 liability. First, the NFL contends that it is a single entity incapable of conspiring to restrain trade under section 1. Second, it insists that Rule 4.3 is not an unreasonable restraint of trade under section 1.

A. *Single Entity*

The NFL contends the league structure is in essence a single entity, akin to a partnership or joint venture, precluding application of Sherman Act section 1 which prevents only contracts, combinations or conspiracies in restraint of trade. The Los Angeles Coliseum and Raiders reject this position and assert the League is composed of 28 separate legal entities which act independently.

The district court directed a verdict for plaintiffs on this issue and as a preliminary matter the NFL states the jury should have been allowed to decide the question. A directed verdict may be granted pursuant to Fed.R.Civ.P. 50(a) when, viewing the evidence in a light most favorable to the nonmoving party, the testimony and all the inferences that the jury could justifiably draw therefrom are insufficient to support any other finding. *Independent Iron Works, Inc.* v. *United States Steel Corp.,* 322 F.2d 656,661 (9th Cir.), *cert. denied,* 375 U.S. 922, 84 S.Ct. 267, 11 L.Ed.2d 165 (1963). When there is no substantial evidence to support a claim, i.e., only one conclusion can be drawn, the court must direct a verdict, even in an antitrust case. *Cleary* v. *Nat'l Distillers and Chemical Corp.,* 505 F.2d 695, 696 (9th Cir.1974). Our review is *de novo. Santa*

Clara Valley Distributing Co. v. *Pabst Brewing Co.*, 556 F.2d 942, 944 (9th Cir.1977).

It is true, as the NFL contends, that the nature of an entity and its ability to combine or conspire in violation of § 1 is a fact question. *Murray* v. *Toyota Motor Distributors, Inc.*, 664 F.2d 1377, 1379 (9th Cir.), *cert. denied*, 457 U.S. 1106, 102 S.Ct. 2905, 73 L.Ed.2d 1314 (1982). It would be reversible error, then, to take the issue from the jury if reasonable minds could differ as to its resolution. *Id.* Here, however, the material facts are undisputed. How the NFL is organized and the nature and extent of cooperation among the member clubs is a matter of record; the NFL Constitution and Bylaws contain the agreement. Based on the undisputed facts and the law on this subject, the district court correctly decided this issue.

The district court cited three reasons for rejecting the NFL's theory. Initially, the court recognized the logical extension of this argument was to make the League incapable of violating Sherman Act § 1 in every other subject restriction—yet courts have held the League violated § 1 in other areas. 519 F.Supp. at 583. Secondly, other organizations have been found to violate § 1 though their product was "just as unitary . . . and requires the same kind of cooperation from the organization's members." *Id.* Finally, the district court considered the argument to be based upon the false premise that the individual NFL "clubs are not separate business entities whose products have an independent value." 519 F.Supp. at 584. We agree with this reasoning.

NFL rules have been found to violate § 1 in other contexts. Most recently, the Second Circuit analyzed the NFL's rule preventing its member-owners from having ownership interests in other professional sports clubs. *North American Soccer League* v. *National Football League*, 670 F.2d 1249, 1257-1259 (2d Cir.), *cert. denied*, 459 U.S. 1074, 103 S.Ct. 499, 74 L.Ed.2d 639 (1982). It recognized the cooperation necessary among league members, even characterizing the NFL as a joint venture, but nonetheless applied rule of reason analysis and found the cross-ownership rule violated § 1. Other courts have held the League rules governing player contracts violate § 1 of

the Sherman Act. *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173 (D.C.Cir.1978); *Mackey* v. *NFL*, F.2d 606 (8th Cir.1976); *Kapp* v. *NFL*, 390 F.Supp. 73 (N.D.Cal.1974), *appeal vacated*, 586 F.2d 644 (9th Cir.1978), *cert. denied*, 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979). As noted by the Second Circuit in *Soccer League*, a finding of single entity status would immunize the NFL from § 1 scrutiny:

> To tolerate such a loophole would permit league members to escape antitrust responsibility for any restraint entered into by them that would benefit their league or enhance their ability to compete even though the benefit would be outweighed by its anticompetitive effects. Moreover, the restraint might be one adopted more for the protection of individual league members from competition than to help the league.

670 F.2d at 1257.

Cases applying the single entity or joint venture theory in other business areas also contradict the NFL's argument. As stated by the Supreme Court:

> Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labelling the project a "joint venture." Perhaps every agreement and combination in restraint of trade could be so labeled.

Timken Roller Bearing Co. v. *United States*, 341 U.S. 593, 598, 71 S.Ct. 971, 974, 95 L.Ed. 1199, 1206 (1951). *Timken* involved an allegation of territorial division among three companies that shared partial common ownership. In *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-142, 88 S.Ct. 1981, 1985-1986, 20 L.Ed.2d 982, 992 (1968), the Court reiterated that common ownership will not suffice to preclude the application of § 1. While these cases and others have been the subject of some criticism, *see, e.g.*, M.

Handler and T. Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo Law Review 23 (1981), they remain the law. In recognition that a broad application of *Timken* and *Perma Life* could subvert legitimate procompetitive business associations, this circuit has found the threshold requirement of concerted activity missing among "multiple corporations operated as a single entity" when "corporate policies are set by one individual or by a parent corporation." *General Business Systems* v. *North American Philips Corp.*, 699 F.2d 965, 980 (9th Cir.1983); *see Thomsen* v. *Western Co.*, 680 F.2d 1263, 1266 (9th Cir.), *cert. denied*, 459 U.S. 991, 103 S.Ct. 348, 74 L.Ed.2d 387 (1982); *Las Vegas Sun, Inc.* v. *Summa Corp.*, 610 F.2d 614, 617 (9th Cir.1979), *cert. denied*, 447 U.S. 906, 100 S.Ct. 2988, 64 L.Ed.2d 855 (1980). The facts make it clear the NFL does not fit within this exception. While the NFL clubs have certain common purposes, they do not operate as a single entity. NFL policies are not set by one individual or parent corporation, but by the separate teams acting jointly.

It is true the NFL clubs must cooperate to a large extent in their endeavor in producing a "product"—the NFL season culminating in the Super Bowl. The necessity that otherwise independent businesses cooperate has not, however, sufficed to preclude scrutiny under § 1 of the Sherman Act. In *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945), the Supreme Court rejected the assertion that the AP was immune from section 1 because it was a necessary cooperative of independent newspapers which produced a product its individual members could not. *Id.* at 26, 65 S.Ct. at 1427, 89 L.Ed. at 2034 (Frankfurter, J., concurring). More recently, the Court found the cooperation required among ostensible competitors in arranging blanket licensing of copyrighted songs precluded only a finding of per se illegality; instead, rule of reason analysis was the proper method to determine the legality of the arrangement. *Broadcast Music, Inc.* v. *Columbia Broadcast System, Inc.*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1

(1979);[3] *see also Silver* v. *New York Stock Exchange*, 378 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963).

The case of *United States* v. *Sealy, Inc.*, 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967), is closely on point. Sealy licensed manufacturers to sell bedding products under the Sealy name and allocated territories to the licensees. The facts showed, however, that this arrangement was not vertical but horizontal; the 30 licensees, owning all of the stock of Sealy, controlled all its operations. 388 U.S. at 352-353, 87 S.Ct. at 1849-1850, 18 L.Ed.2d at 1242. Describing the Sealy organization as a joint venture, the Court nonetheless found it a per se violation of the Sherman Act. *See also United States v. Topco Associates, Inc.*, 405 U.S. 596, 609, 92 S.Ct. 1126, 1134, 31 L.Ed.2d 515, 526 (1972) (Court finding a per se violation on facts similar to *Sealy*).

The NFL structure is very similar to that in *Sealy*. The League itself is only in very limited respects an identity separate from the individual teams. It is an unincorporated, not-for-profit, "association." It has a New York office run by the Commissioner, Pete Rozelle, who makes day-to-day decisions regarding League operations. Its primary functions are in the areas of scheduling, resolving disputes among players and franchises, supervising officials, discipline and public relations. The decision involved here on territorial divisions is made by the NFL Executive Committee which is comprised of a representative of each club. Even though the individual clubs often act for the common good of the NFL, we must not lose sight of the purpose of the NFL as stated in Article I of its constitution,

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[3] On remand in *Broadcast Music* the Second Circuit did not conclude, as the NFL claims, that rule of reason analysis was unnecessary. It found only that it was unnecessary to balance the pro and anticompetitive effects of the blanket licensing arrangement because no anticompetitive effects were proven. *Columbia Broadcasting System, Inc.* v. *American Society of Composers*, 620 F.2d 930, 934-935 (2d Cir.1980), *cert. denied*, 450 U.S. 970. 101 S.Ct. 1491, 67 L.Ed.2d 621 (1981). As will be discussed below, that reasoning squares with this circuit's view that a showing of anticompetitive effect is a threshold rule of reason consideration. *See Cascade Cabinet Co.* v. *Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1373 (9th Cir.1983).

which is to "promote and foster the primary business of League members." Although the business interests of League members will often coincide with those of the NFL as an entity in itself, that commonality of interest exists in every cartel. As in *Sealy*, we must look behind the label proffered by the defendants to determine the substance of the entity in question. 388 U.S. at 353, 87 S.Ct. at 1850, 18 L.Ed.2d at 1242.

Our inquiry discloses an association of teams sufficiently independent and competitive with one another to warrant rule of reason scrutiny under § 1 of the Sherman Act. The NFL clubs are, in the words of the district court, "separate business entities whose products have an independent value." 519 F.Supp. at 584. The member clubs are all independently owned. Most are corporations, some are partnerships, and apparently a few are sole proprietorships. Although a large portion of League revenue, approximately 90%, is divided equally among the teams, profits and losses are not shared, a feature common to partnerships or other "single entities." In fact, profits vary widely despite the sharing of revenue. The disparity in profits can be attributed to independent management policies regarding coaches, players, management personnel, ticket prices, concessions, luxury box seats, as well as franchise location, all of which contribute to fan support and other income sources.

In addition to being independent business entities, the NFL clubs do compete with one another off the field as well as on to acquire players, coaches, and management personnel. In certain areas of the country where two teams operate in close proximity, there is also competition for fan support, local television and local radio revenues, and media space.

These attributes operate to make each team an entity in large part distinct from the NFL. It is true that cooperation is necessary to produce a football game. However, as the district court concluded, this does not mean, "that each club can produce football games only as an *NFL* member." 519 F.Supp. at 584. This is especially evident in light of the emergence of the United States Football League.

For the foregoing reasons, we affirm the district court's rejection of the NFL's single entity defense.[4] Of course, the singular nature of the NFL will need to be accounted for in discussing the reasonableness of the restriction on team movement, but it is not enough to preclude § 1 scrutiny. The NFL's related argument that Rule 4.3 is valid as a restraint ancillary to a joint venture agreement will be discussed in the rule of reason analysis that follows. Contrary to the NFL's apparent belief, the ancillary restraint doctrine is not independent of the rule of reason. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 at 689, 98 S.Ct. 1355, 1364, 55 L.Ed.2d 637 at 648; *see* R. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L.J. 775, 796-801 (1965).

B. ***Rule of Reason***

In *Chicago Board of Trade* v. *United States*, 246 U.S. 281, 288, 88 S.Ct. 242, 244, 62 L.Ed. 683, 687 (1918), Justice

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[4] One district court case has reached the opposite conclusion in a somewhat similar context. In *San Francisco Seals, Ltd.* v. *National Hockey League*, 379 F.Supp. 965 (C.D.Cal.1974), the court upheld the NHL's right to preclude the Seals' proposed move to Vancouver. The court found both that the NHL is a single entity incapable of conspiring in violation of § 1 of the Sherman Act and that the denial of the move had no anticompetitive effect. A recent law review article argues that the court in *Seals* correctly decided the single entity issue. M. Grauer, *Recognition of the National Football League as a Single Entity under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model*, 82 Mich.L.Rev. 1 (1983). Although *Seals* and this article offer persuasive reasons for recognizing the NFL as a single entity, we do not find these reasons so compelling that existing precedent can be ignored or that we should grant this association of 28 independent businesses blanket immunity from attack under § 1 of the Sherman Act. The unitary nature of the NFL can be accounted for by analyzing the competitive harms and benefits of Rule 4.3 under the rule of reason, without impinging on Congress' authority to decide whether a specific industry deserves an exemption from the antitrust laws. *See Jefferson County Pharmaceuticals* v. *Abbott Laboratories*, ___U.S.___ _____, 103 S.Ct. 1011, 1016-17, 74 L.Ed.2d 882, 890-91 (1983); *see also United States* v. *Cooper Corp.*, 312 U.S. 600, 606, 61 S.Ct. 742, 744, 85 L.Ed. 1071, 61 S.Ct. 742 (1941).

Brandeis announced what has become the classic approach used in rule of reason analysis:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation, or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

As elaborated upon by this circuit: "Rule of reason analysis calls for a 'thorough investigation of the industry at issue and a balancing of the arrangement's positive and negative effects on competition.'" *Cascade Cabinet,* 710 F.2d at 1373 (quoting *Northrop Corp* v. *McDonnell Douglas Corp.,* 705 F.2d 1030, 1050 (9th Cir.1983)). This balancing process is not applied, however, until after the plaintiff has shown the challenged conduct restrains competition. *Cascade Cabinet,* 710 F.2d at 1373. To establish a cause of action, plaintiff must prove these elements: "(1) An agreement among two or more persons or distinct business entities; (2) Which is intended to harm or unreasonably restrain competition; (3) And which actually causes injury to competition." *Kaplan* v. *Burroughs Corp.,* 611 F.2d 286, 290 (9th Cir.1979), *cert. denied,* 447 U.S. 924, 100 S.Ct. 3016, 65 L.Ed.2d 1116 (1980); *accord Reid Brothers Logging Co.* v. *Ketchikan Pulp Co.,* 699 F.2d 1292, 1296 (9th Cir.1983).

Our rejection of the NFL's single entity defense implicitly recognized the existence of the first element—the 28 member

clubs have entered an agreement in the form of the NFL Constitution and Bylaws. As will be developed in more detail, we have no doubt the plaintiffs also met their burden of proving the existence of the second element. Rule 4.3 is on its face an agreement to control, if not prevent, competition among the NFL teams through territorial divisions. The third element is more troublesome. It is in this context that we discuss the NFL's ancillary restraint argument. Also, a showing of injury to competition requires "[p]roof that the defendant's activities had an impact upon competition in a relevant market," *Kaplan*, 611 F.2d at 291, proof that "is an absolutely essential element of a rule of reason case." *Id.; see Aydin Corp.* v. *Loral Corp.*, 718 F.2d 897, 901 (9th Cir.1983).

Other courts have applied rule of reason analysis to determine the legality of concerted action undertaken by the NFL and for the most part have found such action illegal. *E.g., North American Soccer League*, 670 F.2d 1249; *Smith* v. *Pro Football, Inc.*, 598 F.2d 1178 (D.C.Cir.1978); *Mackey* v. *National Football League*, 543 F.2d 606 (8th Cir.1976), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977). The instant case is the first of this type in this circuit, however, and the first in which a member club has questioned the legality of NFL rules.

In a quite general sense, the case presents the competing considerations of whether a group of businessmen can enforce an agreement with one of their co-contractors to the detriment of that co-contractor's right to do business where he pleases. More specifically, this lawsuit requires us to engage in the difficult task of analyzing the negative and positive effects of a business practice in an industry which does not readily fit into the antitrust context. Section 1 of the Sherman Act was designed to prevent agreements among competitors which eliminate or reduce competition and thereby harm consumers. Yet, as we discussed in the context of the single entity issue, the NFL teams are not true competitors, nor can they be.

The NFL's structure has both horizontal and vertical attributes. *See, e.g., Continental TV, Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). On the one

hand, it can be viewed simply as an organization of 28 competitors, an example of a simple horizontal arrangement. On the other, and to the extent the NFL can be considered an entity separate from the team owners, a vertical relationship is disclosed. In this sense the owners are distributors of the NFL product, each with its own territorial division. In this context it is clear that the owners have a legitimate interest in protecting the integrity of the League itself. Collective action in areas such as League divisions, scheduling and rules must be allowed, as should other activity that aids in producing the most marketable product attainable. Nevertheless, legitimate collective action should not be construed to allow the owners to extract excess profits. In such a situation the owners would be acting as a classic cartel. Agreements among competitors, i.e., cartels, to fix prices or divide market territories are presumed illegal under § 1 because they give competitors the ability to charge unreasonable and arbitrary prices instead of setting prices by virtue of free market forces. *See United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397, 47 S.Ct. 377, 379, 71 L.Ed. 700, 705 (1927); *United States* v. *Topco Associates*, 405 U.S. at 611, 92 S.Ct. at 1135, 31 L.Ed.2d at 527-528.

On its face, Rule 4.3 divides markets among the 28 teams, a practice presumed illegal, but, as we have noted, the unique structure of the NFL precludes application of the per se rule. *North American Soccer League*, 670 F.2d at 1258-1259; *see Cascade Cabinet Co.* v. *Western Cabinet & Millwork, Inc.*, 710 F.2d 1366, 1370-1373 (9th Cir.1983). Instead, we must examine Rule 4.3 v. Western whether it reasonably serves the legitimate collective concerns of the owners or instead permits them to reap excess profits at the expense of the consuming public.

1. Relevant Market

The NFL contends it is entitled to judgment because plaintiffs failed to prove an adverse impact on competition in a relevant market. The NFL's claim that it is entitled to judgment notwithstanding the verdict is governed by the same standards as a motion for directed verdict, discussed above. The court is not permitted to account for witness credibility,

weigh the evidence or reach a different result it finds more reasonable as long as, viewing the evidence in a light most favorable to the nonmoving party, the jury's verdict is supported by substantial evidence. *William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1026 (9th Cir.1981), *cert. denied*, 459 U.S. 825, 103 S.Ct. 58, 74 L.Ed. 61 (1982).

The relevant market provides the basis on which to balance competitive harms and benefits of the restraint at issue. *See Kaplan*, 611 F.2d at 291; *see also Lektro-Vend Corp.* v. *Vendo Co.*, 660 F.2d 255, 268-269 (7th Cir.1981), *cert. denied*, 455 U.S. 921, 102 S.Ct. 1277, 71 L.Ed.2d 461 (1982). Such evidence is essential in a section 1 case. *See Continental TV, Inc.*, 433 U.S. at 53 n. 21, 97 S.Ct. at 2559 n. 21, 53 L.Ed.2d at 582, n. 21 ("an antitrust policy divorced from market considerations would lack any objective benchmarks").

In the present case, the parties entered a stipulation regarding relevant market evidence because the time allowed for witnesses in the second trial was restricted by the trial court. The stipulation provided that no experts would be called to testify on the subject. Instead, the transcripts and exhibits used by the economic experts were deemed incorporated in the record and admitted in evidence at the retrial, allowing counsel to argue market issues as if the experts had testified before the jury. Our review shows, however, that neither the transcripts nor the exhibits were placed before the jury. We are surprised that in a trial of this magnitude these able attorneys would neglect such important evidence. Upon a careful review of the record, however, we find that testimony of others was sufficient to cover the subject where necessary, and to guide the jury's finding that Rule 4.3 is an unreasonable restraint of trade.

In the antitrust context, the relevant market has two components: the product market and the geographic market. Product market definition involves the

> process of describing those groups of producers which, because of the similarity of their products, have the ability—actual or potential—to take

> significant amounts of business away from each other. A market definition must look at all relevant sources of supply, either actual rivals or eager potential entrants to the market.

Kaplan, 611 F.2d at 292 (quoting *SmithKline Corp.* v. *Eli Lilly & Co.*, 575 F.2d 1056, 1063 (3d Cir.), *cert. denied*, 439 U.S. 88C, 99 S.Ct. 123, 58 L.Ed.2d 134 (1978)). Two related tests are used in arriving at the product market: first, reasonable interchangeability for the same or similar uses; and second, cross-elasticity of demand, an economic term describing the responsiveness of sales of one product to price changes in another. *Id.* at 291; see S. J. von Kalinowski, *Antitrust Laws and Trade Regulations*. § 8.02[2] (1983). Similar considerations determine the relevant geographic market, which describes the "economically significant" area of effective competition in which the relevant products are traded. *Kaplan*, 611 F.2d at 292 (quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962)).

The claims of the Raiders and the L.A. Coliseum, respectively, present somewhat different market considerations. The Raiders attempted to prove the relevant market consists of NFL football (the product market) in the Southern California area (the geographic market). The NFL argues it competes with all forms of entertainment within the United States, not just Southern California. The L.A. Coliseum claims the relevant market is stadia offering their facilities to NFL teams (the product market) in the United States (the geographic market). The NFL agrees with this geographic market, but argues the product market involves cities competing for all forms of stadium entertainment, including NFL football teams.

That NFL football has limited substitutes from a consumer standpoint is seen from evidence that the Oakland Coliseum sold out for 10 consecutive years despite having some of the highest ticket prices in the League. A similar conclusion can be drawn from the extraordinary number of television viewers—over 100 million people—that watched the 1982 Super Bowl, the ultimate NFL product. NFL football's importance to the television networks is evidenced by the approximately $2

billion they agreed to pay the League for the right to televise the games from 1982-1986. This contract reflects the networks' anticipation that the high number of television viewers who had watched NFL football in the past would continue to do so in the future.

To some extent, the NFL itself narrowly defined the relevant market by emphasizing that NFL football is a unique product which can be produced only through the joint efforts of the 28 teams. Don Shula, coach of the Miami Dolphins, underscored this point when he stated that NFL football has a different set of fans than college football.

The evidence from which the jury could have found a narrow pro football product market was balanced, however, with other evidence which tended to show the NFL competes in the first instance with other professional sports, especially those with seasons that overlap with the NFL's. On a broader level, witnesses such as Pete Rozelle and Georgia Frontierre (owner of the L.A. Rams) testified that NFL football competes with other television offerings for network business, as well as other local entertainment for attendance at the games.

In terms of the relevant geographic market, witnesses testified, in particular Al Davis, that NFL teams compete with one another off the field for fan support in those areas where teams operate in close proximity such as New York City-New Jersey, Washington, D.C.-Baltimore, and formerly San Francisco-Oakland. Davis, of course, had firsthand knowledge of this when his team was located in Oakland. Also, the San Francisco Forty-Niners and the New York Giants were paid $18 million because of the potential for harm from competing with the Oakland Raiders and the New York Jets, respectively, once those teams joined the NFL as a result of the merger with the American Football League. Al Davis also testified at length regarding the potential for competition for fan support between the Raiders and the Los Angeles Rams once his team relocated in Los Angeles.

Testimony also adequately described the parameters of the stadia market. On one level, stadia do compete with one

another for the tenancy of NFL teams. Such competition is shown by the Rams' move to Anaheim. Carroll Rosenbloom was offered what he considered to be a more lucrative situation at the Big A Stadium, so he left the L.A. Coliseum. In turn, the L.A. Coliseum sought to lure existing NFL teams to Los Angeles. Competition between the L.A. Coliseum and the Oakland Coliseum for the tenancy of the Raiders resulted.

It is true, as the NFL argues, that competition among stadia for the tenancy of professional football teams in presently limited. It is limited, however, because of the operation of Rule 4.3. Prior to this lawsuit, most teams were allowed to relocate only within their home territory. That is why Carroll Rosenbloom could move his team to Anaheim. This is not to say the *potential* for competition did not previously exist. There was evidence to the effect that the NFL in the past remained expressly noncommitted on the question of team movement. This was done to give owners a bargaining edge when they were renegotiating leases with their respective stadia. The owner could threaten a move if the lease terms were not made more favorable.

The NFL claims that it is places, not particular stadia, that compete for NFL teams. This is true to a point because the NFL grants franchises to locales (generally a city and a 75 mile radius extending from its boundary). It is the individual stadia, however, which are most directly impacted by the restrictions on team movement. A stadium is a distinct economic entity and a territory is not.

It is also undoubtedly true, as the NFL contends, that stadia attempt to contract with a variety of forms of entertainment for exhibition in their facilities. In the case of the L.A. Coliseum, this includes college football, concerts, motorcycle races and the like. An NFL football team, however, is an especially desirable tenant. The L.A. Coliseum, for example, had received the highest rent from the Rams when they played there. We find that this evidence taken as a whole provided the jury with an adequate basis on which to judge the reasonableness of Rule 4.3 both as it affected competition among NFL teams and among stadia.

We conclude with one additional observation. In the context of this case in particular, we believe that market evidence, while important, should not become an end in itself. Here the exceptional nature of the industry makes precise market definition especially difficult. To a large extent the market is determined by how one defines the entity: Is the NFL a single entity or partnership which creates a product that competes with other entertainment products for the consumer (e.g., television and fans) dollar? Or is it 28 individual entities which compete with one another both on and off the field for the support of the consumers of the more narrow football product? Of course, the NFL has attributes of both examples and a variety of evidence was presented on both views. In fact, because of the exceptional structure of the League, it was not necessary for the jury to accept absolutely either the NFL's or the plaintiff's market definitions. Instead, the critical question is whether the jury could have determined that Rule 4.3 reasonably served the NFL's interest in producing and promoting its product, i.e., competing in the entertainment market, or whether Rule 4.3 harmed competition among the 28 teams to such an extent that any benefits to the League as a whole were outweighed. As we find below, there was ample evidence for the jury to reach the latter conclusion.

2. *The History and Purpose of Rule 4.3*

The NFL has awarded franchises exclusive territories since the 1930's. In the early days of professional football, numerous franchises failed and many changed location in the hope of achieving economic success. League members saw exclusive territories as a means to aid stability, ensuring the owner who was attempting to establish an NFL team in a particular city that another would not move into the same area, potentially ruining them both.

Rule 4.3 is the result of that concern. Prior to its amendment in 1978, it required unanimous League approval for a move into another team's home territory. That, of course, gave each owner an exclusive territory and he could vote against a move into his territory solely because he was afraid the competition might reduce his revenue. Notably, however,

the League constitution required only three-quarters approval for all other moves. The 1978 amendment removed the double-standard, and currently three-quarters approval is required for all moves.

That the purpose of Rule 4.3 was to restrain competition among the 28 teams may seem obvious and it is not surprising the NFL admitted as much at trial. It instead argues that Rule 4.3 serves a variety of legitimate League needs, including ensuring franchise stability. We must keep in mind, however, that the Supreme Court has long rejected the notion that "ruinous competition" can be a defense to a restraint of trade. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221, 60 S.Ct. 811, 848, 84 L.Ed. 1129, 1167 (1940). Conversely, anticompetitive purpose alone is not enough to condemn Rule 4.3. *See Chicago Board of Trade*, 246 U.S. at 238, 38 S.Ct. at 244, 62 L.Ed. at 687. The rule must actually harm competition, and that harm must be evaluated in light of the procompetitive benefits the rule might foster. *See Kaplan*, 611 F.2d at 291.

3. Ancillary Restraints and the Reasonableness of Rule 4.3

The NFL's primary argument is that it is entitled to judgment notwithstanding the verdict because under the facts and the law, Rule 4.3 is reasonable under the doctrine of ancillary restraints. The NFL's argument is inventive and perhaps it will breathe new life into this little used area of antitrust law, but we reject it for the following reasons.

The common-law ancillary restraint doctrine was, in effect, incorporated into Sherman Act section 1 analysis by Justice Taft in *United States* v. *Addyston Pipe & Steel Co.*, 85 F.271 (6th Cir.1898), *aff'd as modified*, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899). R. Bork, *The Rule of Reason*, *supra* at 799-800. Most often discussed in the area of covenants not to compete, the doctrine teaches that some agreements which restrain competition may be valid if they are "subordinate and collateral to another legitimate transaction and necessary to make that transaction effective." *Id.* at 797-798: *see Addyston Pipe, 85 F. at 281-82; Lektro-Vend*, 660 F.2d at 265.

Generally, the effect of a finding of ancillarity is to "remove the *per se* label from restraints otherwise falling within that category." R. Bork, *Ancillary Restraints and the Sherman Act*, 15 Antitrust L.J. 211, 212 (1959). We assume, with no reason to doubt, that the agreement creating the NFL is valid and the territorial divisions therein are ancillary to its main purpose of producing NFL football. The ancillary restraint must then be tested under the rule of reason, *id.*, the relevance of ancillarity being it "increases the probability that the restraint will be found reasonable." *Aydin Corp.* v. *Loral Corp.*, 718 F.2d 897, 901 (9th Cir.1983). As we have already noted, the rule of reason inquiry requires us to consider the harms and benefits to competition caused by the restraint and whether the putative benefits can be achieved by less restrictive means.

The competitive harms of Rule 4.3 are plain. Exclusive territories insulate each team from competition within the NFL market, in essence allowing them to set monopoly prices to the detriment of the consuming public. The rule also effectively foreclosed free competition among stadia such as the Los Angeles Coliseum that wish to secure NFL tenants. *See Smith* v. *Pro Football, Inc.*, 593 F.2d at 1185. The harm from Rule 4.3 is especially acute in this case because it prevents a move by a team into another existing team's market. If the transfer is upheld, direct competition between the Rams and Raiders would presumably ensue to the benefit of all who consume the NFL product in the Los Angeles area.

The NFL agrues, however, that territorial allocations are *inherent* in an agreement among joint venturers to produce a product. This inherent nature, the NFL asserts, flows from the need to protect each joint venturer in the "legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party." *Addyston Pipe & Steel*, 85 F. at 282. We agree that the nature of NFL football requires some territorial restrictions in order both to encourage participation in the venture and to secure each venturer the legitimate fruits of that participation.

Rule 4.3 aids the League, the NFL claims, in determining its overall geographical scope, regional balance and coverage of

major and minor markets. Exclusive territories aid new franchises in achieving financial stability, which protects the large initial investment an owner must make to start up a football team. Stability arguably helps ensure no one team has an undue advantage on the field. Territories foster fan loyalty which in turn promotes traditional rivalries between teams, each contributing to attendance at games and television viewing.

Joint marketing decisions are surely legitimate because of the importance of television. Title 15, U.S.C. § 1291 grants the NFL an exemption from antitrust liability, if any, that might arise out of its collective negotiation of television rights with the networks. To effectuate this right, the League must be allowed to have some control over the placement of teams to ensure NFL football is popular in a diverse group of markets.

Last, there is some legitimacy to the NFL's argument that it has an interest in preventing transfers from areas before local governments, which have made a substantial investment in stadia and other facilities, can recover their expenditures. In such a situation, local confidence in the NFL is eroded, possibly resulting in a decline in interest. All these factors considered, we nevertheless are not persuaded the jury should have concluded that Rule 4.3 is a reasonable restraint of trade. The same goals can be achieved in a variety of ways which are less harmful to competition.

As noted by Justice Rehnquist, a factor in determining the reasonableness of an ancillary restraint is the "possibility of less restrictive alternatives" which could serve the same purpose. *See* Justice Rehnquist's dissent from the denial of certiorari in *North American Soccer League*, 459 U.S. 1074, ____, 103 S.Ct. 499, 502, 74 L.Ed.2d 639, 641 (1982); *Lektro-Vend*, 660 F.2d at 265. This is a pertinent factor in all rule of reason cases. *See Betaseed, Inc.* v. *U & I Inc.*, 681 F.2d 1203, 1228-30 (9th Cir.1982); *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 303 (2d Cir.1979), *cert. denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980). Here, the district court correctly instructed the jury to take into account the existence of less restrictive alternatives when determining the reasonableness of

Rule 4.3's territorial restraint. 32 T.R.2d at 7218; *see Betaseed, Inc.*, 681 F.2d 1203 at 1228; *Berkey Photo*, 603 F.2d at 803. Because there was substantial evidence going to the existence of such alternatives, we find that the jury could have reasonably concluded that the NFL should have designed its "ancillary restraint" in a manner that served its needs but did not so foreclose competition.

The NFL argues that the requirement of Rule 4.3 that three-quarters of the owners approve a franchise move is reasonable because it deters unwise team transfers. While the rule does indeed protect an owner's investment in a football franchise, no standards or durational limits are incorporated into the voting requirement to make sure that concern is satisfied. Nor are factors such as fan loyalty and team rivalries necessarily considered.

The NFL claims that its marketing and other objectives are indirectly accounted for in the voting process because the team owners vote to maximize their profits. Since the owners are guided by the desire to increase profits, they will necessarily make reasonable decisions, the NFL asserts, on such issues of whether the new location can support two teams, whether marketing needs will be adversely affected, etc. Under the present Rule 4.3, however, an owner need muster only seven friendly votes to prevent three-quarters approval for the sole reason of preventing another team from entering its market, regardless of whether the market could sustain two franchises. A basic premise of the Sherman Act is that regulation of private profit is best left to the marketplace rather than private agreement. *See United States* v. *Trenton Potteries*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927). The present case is in fact a good example of how the market itself will deter unwise moves, since a team will not lightly give up an established base of support to confront another team in its home market.

The NFL's professed interest in ensuring that cities and other local governments secure a return on their investment in stadia is undercut in two ways. First, the local governments

ought to be able to protect their investment through the leases they negotiate with the teams for the use of their stadia. Second, the NFL's interest on this point may not be as important as it would have us believe because the League has in the past allowed teams to threaten a transfer to another location in order to give the team leverage in lease negotiations.

Finally, the NFL made no showing that the transfer of the Raiders to Los Angeles would have any harmful effect on the League. Los Angeles is a market large enough for the successful operation of two teams, there would be no scheduling difficulties, facilities at the L.A. Coliseum are more than adequate, and no loss of future television revenue was foreseen. Also, the NFL offered no evidence that its interest in maintaining regional balance would be adversely affected by a move of a northern California team to southern California.

It is true, as the NFL claims, that the antitrust laws are primarily concerned with the promotion of *interbrand* competition. *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 51, 97 S.Ct. 2549, 2558, 53 L.Ed.2d 568, 581. n. 19 (1977). To the extent the NFL is a product which competes with other forms of entertainment, including other sports, its rules governing territorial division can be said to promote interbrand competition. Under this analysis, the territorial allocations most directly suppress intrabrand, that is, NFL team versus NFL team, competition. A more direct impact on intrabrand competition does not mean, however, the restraint is reasonable. The finder of fact must still balance the gain to interbrand competition against the loss of intrabrand competition. *See id.*, at 51-56, 97 S.Ct. at 2558-2560. Here, the jury could have found that the rules restricting team movement do not sufficiently promote interbrand competition to justify the negative impact on intrabrand competition.

To withstand antitrust scrutiny, restrictions on team movement should be more closely tailored to serve the needs inherent in producing the NFL "product" and competing with other forms of entertainment. An express recognition and consideration of those objective factors espoused by the NFL as important, such as population, economic projections, facilities,

regional balance, etc., would be well advised. *See* L. Kurlantzick, *Thoughts on Professional Sports and the Antitrust Laws,* 15 Conn. L.R. 183, 206 (1983). Fan loyalty and location continuity could also be considered. *Id.* at 206-207. Al Davis in fact testified that in 1978 he proposed that the League adopt a set of objective guidelines to govern team relocation rather than continuing to utilize a subjective voting procedure.

Some sort of procedural mechanism to ensure consideration of all the above factors may also be necessary, including an opportunity for the team proposing the move to present its case. *Id.; see Silver* v. *New York Stock Exchange* 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963) (without procedural safeguards, the collective act of the Exchange in disconnecting the wire service to a broker constituted a boycott, per se illegal under § 1); *cf. Deesen* v. *Professional Golfers Ass'n,* 358 F.2d 165 (9th Cir.), *cert. denied,* 385 U.S. 846, 87 S.Ct. 72, 17 L.Ed.2d 76 (1966) (where PGA had reasonable rules governing eligiblity of players for tournaments, there was not a § 1 violation). In the present case, for example, testimony indicated that some owners, as well as Commissioner Rozelle, dislike Al Davis and consider him a maverick. Their vote against the Raiders' move could have been motivated by animosity rather than business judgment.

Substantial evidence existed for the jury to find the restraint imposed by Rule 4.3 was not reasonably necessary to the production and sale of the NFL product. Therefore, the NFL is not entitled to judgment notwithstanding the verdict.

III. JURY INSTRUCTIONS

The NFL also claims it is entitled to a new trial because of error in the jury instructions. In particular, the NFL argues that the instructions lacked the specificity required in a complex lawsuit such as this, that certain of its legal theories should have been presented to the jury, and that the instructions failed to articulate all the requirements of the law for finding an unlawful restraint of trade. The L.A. Coliseum and the Raiders

respond by stating that the instructions as given were entirely adequate and the NFL simply attempted to have the jury charged with a partisan and erroneous view of the law.

As required by Fed.R.Civ.P. 51, the NFL submitted proposed instructions and made timely objections when certain of its proposals were rejected. The question, then, is whether, viewing the jury instructions as a whole, the trial judge gave adequate instructions on each element of the case to insure that the jury fully understood the issues. *Ragsdell* v. *Southern Pacific Transportation Co.*, 688 F.2d 1281, 1282 (9th Cir.1982); *Van Cleef* v. *Aeroflex Corp.*, 657 F.2d 1094, 1099 (9th Cir.1981). A court is not required to use the exact words proposed by a party, incorporate every proposition of law suggested by counsel or amplify an instruction if the instructions as given allowed the jury to determine intelligently the issues presented. *Id; Investment Service Co.* v. *Allied Equities Corp.*, 519 F.2d 508, 511 (9th Cir.1975). Well-tailored and specific instructions may be necessary, however, in complex antitrust cases "where . . . abstract legal principles are not self-explanatory to a lay jury, and the facts to which they must be applied are complex." *Lessig* v. *Tidewater Oil Co.*, 327 F.2d 459, 466 n. 13 (9th Cir.), *cert. denied*, 377 U.S. 993, 84 S.Ct. 1920, 12 L.Ed.2d 1046 (1964). Also, a party is entitled to have theories supported by the evidence presented to the jury. *Reno-West Coast Distribution Co., Inc.* v. *Mead Corp.*, 613 F.2d 722, 725-726 (9th Cir.), *cert. denied*, 444 U.S. 927, 100 S.Ct. 267, 62 L.Ed.2d 138 (1979). The theory, of course, must have legal as well as factual support; if what is proposed is incorrect the court is not required to recast it in order to ensure the party's exact theory is before the jury, so long as the instructions describe the applicable law. *See id.*

The NFL first contends the instructions failed to emphasize the unique nature of the business of producing NFL football, a business, it argues, most aptly characterized as a joint venture. The trial court's rule of reason instruction, however, told the jury it should consider the "nature of" and "facts peculiar to" the industry and that "one factor you may consider is the degree of mutual cooperation inherent among the member

clubs of a professional sports league and the extent to which professional sports leagues differ from ordinary kinds of businesses." 32 T.R.2d at 7216-7218. While not framed in the terms and detail requested by the NFL, this instruction did apprise the jury of the unique nature of NFL football. The trial court was not obliged to specifically instruct the jury on the NFL's theory that the restraint involved here is ancillary to a valid joint venture agreement. The Supreme Court has recognized that the "Rule of Reason . . . has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction." *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 689, 98 S.Ct. 1355, 1364, 55 L.Ed.2d 637, 648 (1978). The NFL's theory is subsumed within the rule of reason. As the district court emphasized, the NFL had every opportunity to present its view of the legality of Rule 4.3 to the jury. 32 T.R.2d at 7195, 7223. The NFL did just that in its closing argument. E.g., 33 T.R.2d at 7491-7495.

The NFL next argues the district court improperly rejected its instruction on causation. It is true the court did not instruct the jury on this element of proving when an injured party is entitled to treble damages under § 4 of the Clayton Act. *See Brunswick* v. *Pueblo Bowl-O-Mat,* 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701, 712 (1977); *see also Kapp* v. *National Football League,* 586 F.2d 644, 648 (9th Cir.1978), *cert. denied,* 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979). In this bifurcated trial, however, the jury and the court were not faced with the question of the propriety of an award of damages, but with the question whether Rule 4.3 violated the antitrust laws and therefore could not be used to preclude the Raiders' move south. *Pueblo Bowl-O-Mat,* 429 U.S. at 491, 97 S.Ct. at 698, 50 L.Ed.2d at 713. Whether the jury received proper instructions in this area is best left for the appeal of the damage portion of the trial.

The NFL also argues it was unduly prejudiced by the instructions because they focused on issues of competition among the NFL teams (intrabrand competition) rather than competition between the NFL "product" and other forms of

entertainment (interbrand competition). As the NFL asserts, it is the suppression of interbrand competition that primarily concerns the antitrust laws. The trial court instructed the jury on the NFL's relevant market claim that it competes with all forms of entertainment. 32 T.R.2d at 7212-7215. In light of this instruction, the jury was not constrained to ascertain the reasonableness of Rule 4.3 solely in view of the internal NFL market.

There also was no error in the failure of the district court to charge the jury that it could balance the loss of competition in the San Francisco Bay Area against that to be gained in the Los Angeles area. The extent of the loss and gain to competition in these locations was a fact question that could be argued to the jury.

The NFL next argues that the trial court should have charged the jury that it could consider the procompetitive significance of public service and similar benefits, if any, that inure to Rule 4.3. We again find no error. As stated in *National Society of Professional Engineers:*

> the purpose of [either per se or rule of reason] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of the industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.

435 U.S. at 692, 98 S.Ct. at 1365, 55 L.Ed.2d at 650. The judge instructed the jury that it should consider only procompetitive benefits of Rule 4.3. 32 T.R.2d at 7216. The NFL was permitted to argue that Rule 4.3 has procompetitive effects related to serving the public. No more is necessary.

The NFL's other assignments of error in the instructions are without merit. In sum, we are not persuaded that any lack of specificity misled the jury.

IV. VENUE

Oakland Coliseum, intervenor joined by the NFL, argues that the trial court abused its discretion by denying a change of venue motion made pursuant to 28 U.S.C. § 1404(a). In relevant portion, § 1404(a) allows a district court to change venue "in the interest of justice." Oakland Coliseum claims justice would have best been served by moving the case because it was impossible to secure an impartial jury in the Central District of California due to pretrial publicity and the economic interest of the prospective jurors in the outcome of the lawsuit. Prior to voir dire, the district court made a thoughtful and thorough analysis of Oakland's contentions in its memorandum and order denying the change of venue motion. 89 F.R.D. 497 (1981).

We will find an abuse of discretion warranting reversal only if Oakland Coliseum shows "that the setting of the trial was inherently prejudicial or that the jury selection process permits an inference of actual prejudice." *Murphy* v. *Florida*, 421 U.S. 794, 803, 95 S.Ct. 2031, 2037, 44 L.Ed.2d 589, 597 (1975); *see Smith* v. *Phillips*, 455 U.S. 209, 215-217, 102 S.Ct. 940, 944-945, 71 L.Ed.2d 78, 85-86 (1982); *Chandler* v. *Florida*, 449 U.S. 560, 581-582, 101 S.Ct. 802, 813, 66 L.Ed.2d 740, 756 (1981); *United States* v. *Bailleaux*, 685 F.2d 1105, 1109 (9th Cir.1982); *United States* v. *Brown*, 540 F.2d 364, 379 (8th Cir.1976). Neither the pretrial publicity nor the alleged financial interest of the jurors compels such a finding.

We assume, with some basis, that the Raiders' proposed move and this lawsuit generated a large amount of publicity in the Los Angeles area. That in itself, however, is insufficient to compel a finding that the defendants were denied an impartial jury. *Dobbert* v. *Florida*, 432 U.S. 282, 302-303, 97 S.Ct. 2290, 3202-3203, 53 L.Ed.2d 344, 361-362 (1977); *Murphy* v. *Florida*, 421 U.S. at 800-802, 95 S.Ct. at 2036-2037, 44 L.Ed.2d at 595-596. Only in those situations which are "utterly corrupted by press coverage" will we indulge in a presumption of actual prejudice on the part of any or all of the jurors. *Murphy*, 421 U.S. at 798, 95 S.Ct..at 2035, 44 L.Ed.2d at 594. No such

showing has been made out here. The trial court used a very thorough voir dire process to ensure the jury panel members were not influenced by the publicity prior to trial, including administering a 48-page questionnaire prepared by the NFL to all prospective jurors, giving each side ten peremptory challenges instead of the normal three, and dismissing jurors for cause if even the slightest doubt of prejudice was raised. During the trial, the court admonished the jurors each day to refrain from exposure to any type of media coverage of the trial. In fact, one juror was excused because he admitted reading an unscreened newspaper, even though he adamantly denied reading anything but the Ann Landers column, the comics and the "Family Weekly" section. 23 T.R.2d at 4705-4706, 4920. In view of the trial court's thorough cautionary actions, we cannot say either that he abused his discretion in denying a change of venue or that defendants received an unfair trial because of the publicity.

Failing to show anything beyond the slightest speculation that publicity infected the fairness of the trial, Oakland Coliseum turns to the argument that the jurors had a financial interest in the outcome of the lawsuit which biased their decision. This contention is premised on the economic interest through lower taxes and business generation that residents of the Central District of California purportedly would have in the Raiders' presence in the L.A. Coliseum. The argument also seeks support in Supreme Court precedent such as *Withrow* v. *Larkin*, 421 U.S. 35, 95 S.Ct. 1456, 48 L.Ed.2d 712 (1975), and *Tumey* v. *Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927), which stand for the proposition "that the probability of actual bias on the part of the judge or decisionmaker is too high . . . [when] the adjudicator has a pecuniary interest in the outcome." *Withrow*, 421 U.S. at 47, 95 S.Ct. at 1464, 48 L.Ed.2d at 728. Those cases do not mean, however, that an immeasurable and seemingly insignificant economic benefit to a taxpayer suffices to disqualify her or him as a juror. *Virginia Electric & Power Co.* v. *Sun Shipbuilding & Dry Dock Co.*, 389 F.Supp. 568, 571 (E.D.Va.1975); *cf. United States* v. *Brown* 540 F.2d 864. 379 (8th Cir.1976) (there was no basis to strike

jurors for cause merely on showing they resided in St. Louis and indictment alleged a scheme to defraud the city and its citizens).

Here, in fact, four of the eight jurors resided outside Los Angeles County. All the jurors were questioned during voir dire on their potential for any financially motivated bias and the judge was satisfied with the jurors' responses to his questions. Apparently recognizing the defects in its arguments, Oakland also alleges that the questioning and arguments of plaintiffs' counsel at trial were sufficient to convince the jurors to lay aside their sworn duties and decide the case on the basis of "hometown" interests. We decline to engage in such speculation about the mental processes of the individual jurors.

The other arguments made by Oakland on this issue, such as the one claiming it was denied a representative jury because the jury had no football fans, lack merit. Parties are not entitled to jurors of a particular bent or persuasion. They are entitled only to jurors as fair and impartial as all human circumstances and an evenhanded selection process permits. Nor do we believe the "cumulative" effect of the publicity, economic interests and the like show a sufficient likelihood of actual bias. Without more, we are compelled to affirm the denial of the change of venue motion and conclude that the defendants received a fair trial by an impartial jury.

V. CONCLUSION

The NFL is an unique business organization to which it is difficult to apply antitrust rules which were developed in the context of arrangements between actual competitors. This does not mean that the trial court and jury were incapable of meeting the task, however. The lower court correctly applied and described the law. The reasonableness of a restraint is a "paradigm fact question," *Betaseed, Inc.* v. *U and I Inc.*, 681 F.2d 1203, 1228 (9th Cir.1982), and our review of the record convinces us the jury had adequate evidence to answer that question.

We believe antitrust principles are sufficiently flexible to account for the NFL's structure. To the extent the NFL finds the law inadequate, it must look to Congress for relief.

The judgment finding the NFL liable to the Los Angeles Coliseum and the Raiders, and enjoining the NFL from preventing the Raiders from relocating in Los Angeles is

AFFIRMED.

SPENCER WILLIAMS, District Judge, Sitting by Designation, concurring in part, dissenting in part.

INTRODUCTION:

I respectfully dissent from the majority's opinion, insofar as it affirms the district judge's directed verdict that the N.F.L. was not a single entity as a matter of law.

The dispositive issue before this Court is whether the N.F.L.'s invocation of Rule 4.3 to block the Raiders' move to Los Angeles violates the letter and spirit of § 1 of the Sherman Act, 15 U.S.C. § 1. I conclude that the N.F.L. is, as a matter of law, a single entity insofar as this aspect of its operations is concerned and not subject to the strictures of Sherman Act § 1.

These appeals arise from the controversial relocation of the Raiders National Football League franchise ("Raiders") from Oakland, California to Los Angeles, California. Although many subsidiary procedural issues are posed on appeal, the case stands or falls on whether the trial judge properly concluded that the N.F.L. was not a "single entity", thereby exposing it to liability for Rule 4.3 under the Sherman Act, § 1.

FACTS:

Our consideration of the issue whether or not Rule 4.3 of Article IV of the N.F.L. Constitution violates federal antitrust laws must turn on the relationship of Rule 4.3 to the structure of the league. For this reason, it is appropriate to briefly examine the history and nature of the N.F.L. as a business association, before addressing the issues raised on this appeal.

A. *The Relevant History of the N.F.L.*

The N.F.L. was established early in this century as an unincorporated business association, the members of which were member franchise clubs dispersed throughout the United States. All but one of its members are privately owned and operated and although members of the N.F.L. compete on the playing field, they act jointly in many aspects of their enterprise, as the term "league" implies.

The N.F.L.'s Constitution and By-Laws wield almost plenary control over member clubs' activities; the N.F.L. acts as the legislative entity which sets rules for, and schedules contests between member clubs, and regulates many other aspects of the operation of the professional football industry, (*e.g.*, an annual draft of eligible college athletes), including the territorial restriction on franchise relocation found in Rule 4.3.

Of particular importance to our analysis is the fact that the N.F.L. Constitution provides for coordination of business activities and revenue sharing to an overwhelming degree. For example, the money derived from lucrative national broadcasting contracts is shared among league members according to agreed upon formulae, and this revenue makes up a large part of the revenue of each team. As to gate receipts for regularly scheduled contests between member clubs, there is a prearranged equation splitting gate admissions between the "home" and "visiting" clubs. Thus, each team relies, to a significant degree, on revenue jointly generated.[1] It is not surprising that, concomitant with this virtual "partnership" arrangement, of which the abovementioned revenue sharing is most significant, other operating decisions which would normally be made by the owners of a single franchise are subordinated to specified consent of the other clubs. For example, establishment of a new franchise is submitted for approval to all N.F.L. owners before any expansion is permitted. Agreements among owners regarding who shall have

[1] Indeed, no team could generate any revenue without drawing down upon the goodwill and reputation of the N.F.L. in the largest sense, or upon the status of any one scheduled opponent in an immediate sense, so that, in effect, all team revenue is jointly produced.

the right to employ certain athletes occur every year at an annual "draft" of available players.

At issue here is one aspect of the relationship among the member clubs of the N.F.L. as to when a member franchise club may be relocated to a city other than its original home. It is quite relevant to disposition of this instant suit that those challenging the legality of Rule 4.3 are the Raiders, presently a member club, and the L.A. Coliseum, a stadium seeking an N.F.L. tenant.

B. ***The History of the Present Action.***

I agree in large part with the majority's review of the facts leading up to the two trials below. However, I would emphasize the troubling effect that the stipulation on the presentation of evidence in the second trial had upon the sufficiency of the evidence on relevant markets that was actually placed before the jury.[2]

C. ***The Various Appeals Pending before this Court.***

In addition to the appeal to which the majority and I turn our primary attention, several other motions are pending before this Court. It is these items, and the questions that these cross-appeals raise, that I now address.

Once in this Court, the parties have continued to file multiple, and somewhat conflicting, appeals. The motions that have not been resolved by the majority are largely different procedural means to accomplish the same ends; I discuss the more significant below.

First, the N.F.L. has moved this Court for permission to supplement the record on the question of the effect of the stipulation entered into by the parties concerning the evidence introduced at the second trial on the relevant market. I find the majority's treatment of this matter interesting, inasmuch as it suggests that the issue of relevant market is no longer one for the jury; we admit to similar surprise that the very evidence that

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[2] See Majority Opinion at 1392-1394, and my discussion *infra* of the inconsistency left unanswered by the majority's treatment.

the parties thought at a minimum should have been placed before the jury was, in fact, never so placed in the second trial. Regardless of how the majority wishes to restate the manner in which relevant market is to be proven in this Circuit, its approach is to recharacterize the case as was tried, and suggest by inference that the plaintiff may discharge its burden of establishing the relevant product and geographic markets by a theoretical argument to the court, rather than by presenting evidence to a jury; this lynchpin of its "rule of reasonableness" cannot pass as innocuously by long-standing precedent as the majority would have it. Since I feel that it was error to submit Rule 4.3 to the jury in this context, I would not so strain the case as was tried the second time around to conform it to some new, and as yet undefined, rule of law.

Second, the Raiders cross-appeal from the district judge's rulings: (1) determining, on summary judgment, that N.F.L. Rule 4.3 was effectively amended on October 5, 1978; (2) that, as a matter of law, no contract was created between the Raiders and the N.F.L., on October 5, 1978; and, (3) that a directed verdict on behalf of Rozelle, Frontiere and Klein was appropriate, would presumably be withdrawn, under the majority's disposition; I would affirm the trial court's handling of all three matters.

Finally, as for the N.F.L.'s motion for remand of the injunctive judgment entered on June 14, 1982, with instructions to the court for a new trial, I find the matters raised by the motion in the alternative to the N.F.L.'s notice of appeal, especially the allegations surrounding the plaintiffs' suppression of a key document, the "Hardy notes," distressing. I note that the majority's opinion does not deal with this issue.

DISCUSSION:

The district court found there were no disputed issues of material fact on the question of whether the N.F.L. was a single entity under the Sherman Act § 1, insofar as its enforcement of Rule 4.3 was concerned, and directed a verdict for appellees concluding that it was not. Upon this finding, Rule 4.3 was

submitted to the jury's scrutiny under the Rule of Reason analysis of the Sherman Act, § 1.

Under established Ninth Circuit law, resolution of whether the N.F.L. had the capacity to violate Section 1 of the Sherman Act by conspiring *inter se* must be committed to the jury, if there exists "sufficient evidence in the record to permit a jury to find" that the N.F.L. was not a single entity, but "not ... sufficient (evidence) to preclude the jury from finding otherwise." *Murray* v. *Toyota Motor Distributors, Inc.*, 664 F.2d 1377, 1379 (9th Cir.1982) (*per curiam*).

In *Murray* v. *Toyota Motor Distributors, Inc., supra,* the Ninth Circuit held that the "single entity" question must not be taken from the jury where the evidence would *permit* a finding that the defendants are part of a single economic unit. As the majority in this case states: "(i)t would be reversible error, then, to take the issue from the jury if reasonable minds could differ as to its resolution". *Id.* I read the majority's opinion to find such an opportunity for "reasonable minds" to differ, even if the evidence that whether "the N.F.L. has attributes of a partnership or joint venture (wa)s *not* "compelling", since it should have been submitted to the jury once there was simple "persuasive" evidence on either side. *C.f., Majority Opinion* at 1387.

I agree however with the district court that there were no material issues of disputed fact as to whether the N.F.L. was a single entity, and that the matter was ripe for disposition as a matter of law by the court. I also apply the settled rule of appellate review, that such decisions by the trial court are subject to *de novo* review by this Court. *C.f., General Business Systems* v. *North American Phillips Corp.*, 699 F.2d 965, 980-81 (9th Cir.1983). But, the majority and I differ substantially in the conclusions to be drawn from such undisputed evidence.

The only realistic manner in which to define what constitutes a single entity for antitrust review is to focus upon the purpose the definition is to serve. "Single entity" taken in a functional sense begins and ends with an analysis of formal

organizational and operational aspects of an enterprise, reconciled with the realities of the economic competition in the marketplace. If the aim of the Sherman Act § 1 is consumer-dictated supply, unfretted by conspiracy between competing producers,—and, I submit that it is—extreme caution is warranted in defining precisely what competitive units exist in the marketplace. It is equally as important to permit collaboration and concerted action among branches of a single economic entity in the marketplace with impunity from the Sherman Act § 1, as it is to police conspiracies between economic competitive entities. Nonetheless, all economic units remain susceptible to challenge under the antitrust laws from those external entities injured by acts violative of § 1, or competitive entities injured as result of monopoly, or attempted monopoly, in an industry under Sherman Act § 2 tenets.

Resolving whether the N.F.L. is a single entity requires consideration of many factors, including formalistic aspects of operations such as ownership, overlapping directorates, joint marketing or manufacturing, legal identity, corporate law autonomy, and substantive aspects such as *de facto* autonomy of member clubs, chains of command over policy decisions, public perception and economic interdependency rendering otherwise independent member clubs subordinate to the integrated whole. When the entities in question are to be evaluated under the antitrust laws, the crucial criterion is whether the formally distinct member clubs compete in any economically meaningful sense in the marketplace. See *General Business Systems, supra* at 980-81.

The majority's attempt to reconcile its decision with that of *General Business Systems, supra,* is misleading and inaccurate. The text of the majority's opinion implies that corporate policies *must* be unitary for a business organization to be found a single entity. In *General Business Systems, supra,* at 980-81, the Circuit concluded that in any case in which the relationship between the two or more formal entities did "not fall clearly at either of these extremes"; *i.e.,* "where corporate policies are set by one individual or a parent corporation" or where "jointly owned corporations that compete in the marketplace, hold

themselves out to the public as competing organizations, and set policy independently . . ." (*id.* at 980), the case must be sent to the jury. This admonition was disregarded in this case—a paradigm case testing the functional "single entity" concept.

The district court placed an unwarranted emphasis upon the formalistic aspects of the relationship of the N.F.L. and the member clubs, ignoring the subtle, but yet more significant interdependency of the member clubs and the indivisibility of the clubs with the N.F.L. 519 F.Supp. 581, 582-83. For example, the district court makes much of two such formal organizational characteristics: separate incorporation and management. *Id.* But, when viewed from the mundane perspective of daily operations, emphasis upon these legal formalisms obscures the reality of life in the N.F.L. Only the athletic strategems are autonomous—albeit tightly constrained by league guidelines on eligibility, medical and physical condition and exploitation of player talent. The N.F.L. cannot truly be separated from its member clubs, which are simultaneously franchisees and franchisors. The Raiders did not, and do not now, seek to compete with the other clubs in any sense other than in their win/loss standings; they do not challenge the plethora of other ancillary regulations attendant to the league structure, including the draft, regulation and scheduling of meetings between teams, and the system of pooled and shared revenues among the clubs because they wish to remain within its beneficial ambit.

As the majority opinion correctly points out:

> this lawsuit requires us to engage in the difficult task of analyzing the negative and positive effects of a business practice in an industry which does not readily fit into the antitrust context. Section 1 of the Sherman Act was designed to prevent agreements among competitors which eliminate or reduce competition and thereby harm consumers. Yet, . . . , the N.F.L. teams *are not true competitors, nor can they be.*

Majority opinion, at 1391, *emphasis added.* Yet, the majority's analysis falters in a similar manner. It is the commonality of, or necessary cooperation in, the means of production, not the formal structure of the ownership of the N.F.L. infrastructure which should be determinative of the classification of this enterprise.

The profound interdependency of the N.F.L. and member clubs in the daily operation and strategic marketing of professional football belies the district court's conclusion that each member club is an individual and economically meaningful competitor. The dispositive factor in determining whether the member clubs are capable of conspiring to restrain competition—the *sine qua non* of the Sherman Act § 1—by reason of Rule 4.3, is the extent, if any, of their competition in an economic sense. Virtually every court to consider this question has concluded that N.F.L. member clubs do *not* compete with each other in the economic sense. See *North American Soccer League* v. *N.F.L.,* 670 F.2d 1249, 1251 (2d Cir.1982); *Smith* v. *Pro Football, Inc.,* 593 F.2d 1173, 1179 (D.C.Cir.1978); *Mackey* v. *N.F.L.,* 543 F.2d 606, 619 (8th Cir.1976); *Mid-South Grizzlies* v. *N.F.L.,* 550 F.Supp. 558, 562 (E.D.Pa.1982); *U.S.* v. *N.F.L.,* 116 F.Supp. 319, 323-324 (E.D.Pa.1953).

As the district court in *Mid-South Grizzlies* acknowledged, although

> (a)ll but one team are privately owned and operated . . . and 'compete' with one another on the playing field and for the top players, they act jointly in many aspects of their enterprise as the term league necessarily implies.

Mid-South Grizzlies, supra at 562. In adopting this view to reject a potential entrant's challenge to his exclusion from N.F.L. participation, the court in *Mid-South Grizzlies* recognized that the creation of many joint products, only the most tangible of which is the professional football season, as byproducts of the intangible "goodwill" are directly attributable to the present league/member club structure. *Id.* at 568. I agree with the other courts which, when presented with similar questions

arising in professional hockey and basketball, realized that it is nonsensical to emphasize intrinsic worth of a franchise in a vacuum, when the value of the franchises are part and parcel of the quality and conformity insured by league regulation of the placement, ownership, and coordination of all on and off the field interaction of member clubs. See *San Francisco Seals, Ltd.* v. *National Hockey League,* 379 F.Supp. 966, 969-971 (C.D.Cal.1974) (the N.H.L., although subject to full scope of the antitrust laws, is "one single business enterprise, competing against other similarly organized professional leagues"); *Levin* v. *National Basketball Association,* 885 F.Supp. 149, 150, 152 (S.D.N.Y.1974) ("While it is true that the antitrust laws apply to a professional athletic league, and that joint action by members of a league can have antitrust implications this is not such a case.").

The majority's holding places the Ninth Circuit's ruling in conflict with every other circuit to consider this issue. As the majority points out, but misapplies, the Second Circuit found the N.F.L. to be an "unincorporated joint venture". *N.A.S.L.* v. *N.F.L., supra* at 1257, (2d Cir.), *cert. denied,* ____U.S.____, 103 S.Ct. 499, 74 L.Ed.2d 639 (1982). The Fifth Circuit, in an obscure but quite scholarly opinion, analyzed the North American Soccer League to be like the N.F.L.; *i.e.,* a "joint employer" for labor relations purposes, upon an examination of its "N.F.L.-like" characteristics. *N.A.S.L.* v. *N.L.R.B.,* 613 F.2d 1379, 1382 (5th Cir.1980). The Third Circuit, after reviewing the substantial history of "single entity" litigation in the professional sports leagues, endorsed the D.C. Circuit's conclusion that the N.F.L. was a "single entity" for purposes of Sherman Act § 1, and thus not subject to "invocation of a *per se* rule" against "group boycotts", because: (1) "the N.F.L. clubs that had combined were *not* competitors in any *economic* sense" and "no team was 'interested in driving another team out of business'; and, (2) the N.F.L. clubs had not combined '*to exclude competitors or potential competitors* from their level of the market.' *Larry V. Muko, Inc.* v. *Southwestern P.A., etc.,* 670 F.2d 421, 429, n. 11 (3d Cir.1982), citing *Smith* v. *Pro Football, Inc.,* 593 F.2d 1173, 1178 (D.C.Cir.1978). (*emphasis in original*). (Other citations omitted).

What these courts have all recognized, and what ultimately persuades me, is that functionally distinct units that cannot produce separate, individual goods or services absent coordination are inextricably bound in an economic sense, and must adopt certain intra-league instrumentalities to regulate the whole's "downstream output". In the case of the member clubs, this "downstream output" is professional football, and the organ of regulation is the unincorporated, not-for-profit, association commonly known as the N.F.L. There is virtually no practical distinction between the League, administered by the appointed Commissioner, *per se* and the member clubs; the N.F.L. represents to all clubs, including the Raiders, the least-costly and most efficient manner of reaching day-to-day decisions regarding the production of their main, and collectively produced product.

Although the N.F.L. determines matters of scheduling, resolving player disciplinary matters and inter-club disputes, supervising officials and public relations, as well as other routine matters, critical league decisions, such as the matter of franchise location, are submitted to an Executive Committee comprised of a representative of each club. There can be no instance of the Executive Committee acting in other than the collective interests of the member clubs, since by definition, that body's decisions are the consensus of N.F.L. members. There is no distinct interest of the N.F.L., since it exists solely to coordinate the members' participation in the joint production of professional football.

By riveting its attention upon the "single entity" issue, as a sort of talismanic affirmative defense to the appellees' charges here, the district court overlooked the dispositive inquiry of whether Rule 4.3, as an instrument of the N.F.L. member clubs, violated the Sherman Act § 1, by restricting any economically independent entities from supplying goods and services related to professional football to the individual clubs. I use "upstream flow" as shorthand for products and services like players and coaches, television services, potential investors and the myriad of other integrated industries; member clubs do have independent and economically significant indentities apart from the collective N.F.L. for the limited purposes of their

extra-league dealings with those upstream suppliers. See Weistart & Lowell, *Law of Sports*, § 5.11 (1978), 687, 692 esp. n. 86. Thus, § 1 can and should protect the competitive aspects of player drafts, disallow cross-ownership bans and exclusive television and equipment contracts, by insuring that any one club's interaction outside the confines of intra-league regulation of production of the sport is unfettered by the working of any intraleague rule.

This is the crucial distinction between cases which invalidate various intraleague rules, and those which uphold them. That member clubs compete for investors and the services of talented players is underscored by the fact that, although aggregate revenues are shared among all member clubs, there is no intra-league regulation upon the form of investment by a member club's financial backers, the dividend policy, or operating expenses and expenditures of any member for player services. League regulations comport with economic reality in this sense; courts have merely applied a similar philosophy to other aspects of the professional leagues' operations, including, *inter alia*, club-player relationships. *See, e.g., Smith, supra* (N.F.L. player draft held to violate § 1, even though N.F.L. teams not "economic" competitors, because it "forces each seller of football services to deal with one, and only one buyer, robbing the seller, as in any monopsonistic market, of any real bargaining power."); *Mackey, supra*, (only relevant market in which to evaluate "Rozelle Rule" was that "for players' services"); *Denver Rockets* v. *All-Pro Management, Inc.*, 325 F.Supp. 1049, 1061 (C.D.Cal.1971) (harm resulting from restriction on non-collegiate players' recruiting was these players' exclusion from market in which they sought to compete by reason of the monopoly power exerted by the N.B.A.); *accord, Linseman* v. *World Hockey Association*, 439 F.Supp. 1315, 1322 (D.Conn.1977); *Kapp* v. *National Football League*, 390 F.Supp. 73, 81-82 (N.D.Cal.1974), *appeal vacated*, 586 F.2d 644 (9th Cir.1978), *cert. denied*, 441 U.S. 907, 99 S.Ct. 1996, 60 L.Ed.2d 375 (1979) ("(a) conceivable effect of th(e "ransom" or "Rozelle" rule) would be to *perpetually* restrain a player from pursuing his occupation among the clubs

of a league that holds a virtual monopoly of professional football employment in the United States", which "goes far beyond any possible need for fair protection . . . and imposes upon the player-employers or the purposes of the N.F.L. such undue hardship as to be an unreasonable restraint . . ."); *cf.*, *North American Soccer League, et al.* v. *N.F.L., et al., supra,* (N.F.L. ban on cross-ownership of professional football and soccer league clubs violative of Sherman Act § 1).

The paradox to which I return, as the root of why the N.F.L., as well as other sports leagues, must be regarded as a "single entity" is that the keener the on-field competition becomes, the more successful their off-the-field, and ultimately legally relevant, collaboration. The formal entities, including the member clubs—including the Raiders—which the district court ruled to be competitors cannot compete, because the only product or service which is in their separate interests to produce can only result as a fruit of their joint efforts. This systemic cooperation trickles down to all members of the league, regardless of their on-the-field record, at least to the extent of the shared revenues. As at least one district court has previously recognized, despite some limited independently earned profit from "team paraphernalia" and "local broadcast revenues",

> (a) franchise's popularity is inextricably bound up with the quality of its competition on the playing field and the resulting excitement and sense of team loyalty.

Mid-South Grizzlies, supra, at 568. The ability to accrue separately accounted and disbursed profit, of which the district court made much, "is an indirect benefit of being a member of the league". *Id.*

A ruling that the N.F.L. cannot enforce Rule 4.3 is effectively ruling that it may not enforce any collective decision of its member clubs over the dissent of a club member, although this is precisely what each owner has contractually bargained for in joining the enterprise. Without power to reach collective decisions, the N.F.L. structure becomes superfluous, and professional sports, without a cost-effective policing mecha-

nism such as the league, will dissolve in the face of uncontrollable free-riding and loss of economies of scale. *Broadcast Music, Inc.* v. *Columbia Broadcast Systems, Inc.*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979).

Not only did the district court underrate the business scenario in which the member teams cooperate far more than they compete in the legally irrelevant on-field sense, but its directed verdict on the single entity issue ignored two significant aspects of the N.F.L.'s organization. First, the N.F.L. member clubs pool their revenues to a degree unique even among sporting leagues. By focusing upon the separate calculation of profits and loss by members, the district court elevated form over substance. Profit, as currently understood in the accounting profession, is a term of art, and as such is inherently subjective, often manipulated by equity interests to serve legally irrelevant business motives. The relevant consideration, as the N.F.L. has recognized by implementation of its shared revenue concept, is total infusion of consumer dollars into the sport, and some predictable and centrally administered allocation of those jointly earned revenues among member clubs. After that purpose, the members adopt the only workable model for earning and distributing the revenues from sale of non-severable and indistinct product—professional football. See generally, *Quirk, An Economic Analyisis of Team Movements in Professional Sports*, 38 Law & Contemporary Problems 42 (1973).

The product distributed by the member clubs is not analogous to ball bearings (*Timken Roller Bearing Co.* v. *U.S.*, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951)), mattresses (*U.S.* v. *Sealy, Inc.*, 388 U.S. 350, 87 S.Ct. 1847, 18 L.Ed.2d 1238 (1967)), or groceries (*U.S.* v. *Topco Associates*, 405 U.S. 596, 598, 92 S.Ct. 1126, 1128, 31 L.Ed.2d 515 (1972)), because stripped of the N.F.L. rules, participation in a regulated draft, orderly schedules and league standings, professional football is indistinguishable from sand lot follies. This inescapable fact of interdependence distinguishes the N.F.L. franchisees and professional football from other industries comprised of "separate business entities whose products have

independent value" (519 F.Supp. at 584) banded together in *de facto* cartels. *C.f., Broadcast Music Inc., supra; Associated Press et al.* v. *United States*, 326 U.S. 1, 18, 65 S.Ct. 1416, 1423, 89 L.Ed. 2013 (1945) (Douglas, J., in concurring, notes that it is unclear whether the AP system would violate Sherman Act § 1).

There was no evidence before the district court establishing that a member club of the N.F.L. could, or would seek to, defect to the U.S.F.L., thereby transferring its assets in quest of greater exploitation. Only such a showing, or an alternative theory, supported by evidence in the record could illustrate that any particular member club had an intrinsic value shorn of its affiliation with the N.F.L., and thus could support the district court's result. We find no such evidence in the record. *C.f. Associated Press, supra* (newspapers which sought to affiliate did not share revenues, and each produced separate and distinct products with intrinsic value). There is no evidence that any of the member clubs' investors would have committed time or capital investment without the existing league structure. Without the league, professional football becomes a pursuit no more substantial than a group of finely-tuned athletes traveling haphazardly about, in search of playing competition. *Accord, Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968).

Not only is it legally irrelevant that a second professional league has sprung up, since the U.S.F.L. did not exist at the time of trial, but since the two leagues' schedules do not overlap, one should not hypothesize as to any competitive relationship between the two, or the effect such inter-league competition would portend for the validity of intra-league regulation. Thus, while I find issues of supposed competitive relations between the N.F.L. and U.S.F.L., or between existing and any new franchisees, intellectually interesting, I also dismiss any legal conclusions based upon these entities as speculative.

Holding that the N.F.L. is not a single entity, but rather an aggregation of economic competitors, is tantamount to ruling

that the N.F.L. structure is itself *per se* invalid under the Sherman Act § 1; this will spell the end of sporting leagues as are currently used in football, hockey, golf, soccer, basketball and countless other associations in industries with similar endemic characteristics. See *Board of Regents of the University of Oklahoma v. N.C.A.A.*, 707 F.2d 1147 (10th Cir.1983) *cert. granted*, ____U.S.____, 104 S.Ct. 272, 78 L.Ed.2d 253 (1983).

To elevate formal corporate characteristics of ongoing economic entities above the substance of what purpose and function the structure serves, and what product(s) emerge from the process would not only destroy the N.F.L., professional sports leagues, and the goodwill that results from continuity in national allocation of the sport throughout the country, but would create a rule of law casting all franchise/wholesale distribution relationships into inescapable doubt.

Rather than avoid creating an "exemption" from the Sherman Act for professional sporting leagues, failing to account for the substantial and unique characteristics extant in professional sports by refusing the N.F.L. review as a single entity creates turmoil and dissolves the analytic framework within which courts scrutinize agreements under Sherman Act § 1. It is unrealistic and inaccurate to lump intra-N.F.L. rules in with agreements binding separate economic entities which produce independent products and accrue independent revenues. See *Mid-South Grizzlies, supra; Levin, supra.* Rule 4.3 is no more a restraint on trade in professional football for Sherman Act § 1 purposes, than is an intra-corporate directive regulating the location or operation of its headquarters, franchise, or branch of a multi-outlet business. *See, e.g., Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977).

No "antitrust exemption" for the N.F.L. would be created by holding that it is a single economic entity for purposes of regulating franchise location. Section 2 of the Sherman Act, prohibiting monopolies and attempts to monopolize, remains fully applicable to all N.F.L. intra-league rules and activities. See *Mid-South Grizzlies, supra; c.f., Bowman* v. *N.F.L.*, 402

F.Supp. 754 (D.Minn.1975) (challenge brought by former W.F.L. players to N.F.L. teams as an illegal boycott and unjustified exercise of monopoly power); *Philadelphia World Hockey Club, Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F.Supp. 462 (E.D.Pa.1972) (Sherman Act § 2 applied to bar hockey reserve clause).

Many present N.F.L. practices, including Rule 4.3, are highly suspect under the Sherman Act § 2 prohibitions, because notwithstanding the form or substance of the N.F.L.'s style of organization and operation, some practices appear calculated to create barriers to entry for would-be rival leagues in profitable geographical markets. In short, Sherman Act § 2 is the proper curb upon the N.F.L.'s successful exploitation of its intra-firm economies of scale and competitive advantages. *Radovich* v. *N.F.L.* 352 U.S. 445, 453-54, 77 S.Ct. 390, 394-95, 1 L.Ed.2d 456 (1957) and particularly *American Football League* v. *N.F.L.*, 323 F.2d 124, 131 (4th Cir.1963) suggest the possibility of true economic competitors challenging the effect of intra-league rules upon nascent competition under § 2 of the Sherman Act.

The Raiders do not have standing to challenge Rule 4.3 under § 2; as part and parcel of the entity they knowingly joined in 1967, they may have a cause of action in contract against the rest of the N.F.L. for failure of their expectations arising from their membership, but cannot challenge intra-league regulations, as could would-be "upstream" suppliers or hopeful candidates for franchises like the Mid-South Grizzlies or the San Francisco Seals. See *San Francisco Seals* v. *National Hockey League*, 379 F.Supp. 966, 971-72 (C.D.Cal.1974). The Coliseum may be able to mount a successful challenge to Rule 4.3 upon a § 2 theory, but that issue is not presently before this Court.

As always, § 1 remains a viable theory under which those "upstream" aspects of member clubs' operations—those activities which the N.F.L. and previous courts acknowledge the individual members as economically distinct entities—could be challenged. An oft-tried, and frequently successful example of

this theory has been the player draft litigation; the distinction between instances in which the N.F.L. acts as a collective monitor of intra-league affairs, and those in which it intercedes at the behest of a member club for anti-competitive advantage over "upstream" bargaining entities outside the N.F.L.

The purposes for which the N.F.L. should be viewed as a single entity, impervious to § 1 attack, must be functionally defined as those instances in which member clubs must coordinate intra-league policy and practice if the joint product is to result. *See, Broadcast Music Inc., supra; GTE Sylvania, supra.* Prohibiting the N.F.L. from attempting to exploit a monopolistic position in the industry, or from cloaking concerted anti-competitive pressure upon extrinsic "upstream" suppliers in the guise of "league" restrictions, does not require that we strike ancillary terms of the franchise agreements between member clubs as anti-competitive. A principled approach requires that we distinguish one situation from the other, and protect both competitive markets for football players and television coverage, as well as the integrity of terms Al Davis agreed to as salient aspects of his arms' length negotiations with the other member clubs. Davis has received no more or less than he has bargained for, as a franchisee of the N.F.L.

To hold the N.F.L. a single entity for purposes of intra-league regulation of relocation of existing franchises, thereby cutting off Sherman Act § 1 liability in this instance, is fully consistent with the prior cases that address the validity of league regulation of member clubs. In such cases, the leagues' power has consistently been upheld. *See, e.g., A.F.L.* v. *N.F.L., supra; Mid-South Grizzlies, supra; San Francisco Seals, supra;* and *Levin, supra.*

I concur in the majority's opinion, insofar as it affirms the trial judge's denial of the appellants' motion for a change in venue. However, I would note the inappropriateness of applying the substantial body of case law dealing with racial bias in criminal venire to an instance where the strongest objections to the venue revolved around a highly attentuated financial or civic interest bestowed upon the jury by its deliberations concluding in favor of the L.A. Coliseum and Raiders. I

would commend the trial judge for his extraordinary care in screening out prospective jurors who showed even a hint of bias, in maintaining an orderly proceeding despite the high degree of press coverage and histrionic advocacy by the parties, and in assuring deliberations in an informed and unemotive manner. As a result of his painstaking care, I find that the appellants received the verdict of six fair and untainted jurors.

CONCLUSION:

Because the district court incorrectly determined that the N.F.L. member clubs are not engaged in a single enterprise for purposes of determining the location and marketing of professional football games between members, the jury verdict on the lawfulness of Rule 4.3 must not stand. Rule 4.3 cannot, as a matter of law, violate § 1 of the Sherman Act. The Judgment of the district court should be reversed and judgment entered for the N.F.L. and its codefendants.

APPENDIX B

UNITED STATES DISTRICT COURT

C. D. CALIFORNIA

No. 78-3523-HP—July 24, 1981

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE,
an unincorporated association, et al.,
Defendants.

OAKLAND RAIDERS, LTD.,
Cross-Claimant,

v.

NATIONAL FOOTBALL LEAGUE,
an unincorporated association, et al.,
Cross-Defendants.

Memorandum and Order granting directed verdict for plaintiff and cross-complainant on single entity issue

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PREGERSON, *Circuit Judge:*

This matter is before the court on crossmotions filed, pursuant to Fed.R.Civ.P. 50(a), by the plaintiff Los Angeles Memorial Coliseum Commission, the cross-claimant Oakland Raiders, and the NFL defendants, seeking entry of a directed verdict with respect to the defendants' contention that the NFL is a single economic entity for purposes of this lawsuit and hence cannot as a matter of law have violated section 1 of the Sherman Act. Having studied the parties' briefs and heard the oral argument of counsel on July 24, 1981, the court concludes that the motions of the Coliseum Commission and the Raiders should be granted and that of the NFL denied.

The Los Angeles Memorial Coliseum Commission originally moved before trial for partial summary judgment on the single entity issue. The court denied that motion because it appeared that proper resolution of the issue could well depend on the factual evidence adduced at the trial. Because summary judgment is proper only when it is quite clear what the truth is, *Poller* v. *CBS,* 368 U.S. 464, 467, 82 S.Ct. 486, 488, 7 L.Ed.2d 458 (1962), a district court may properly deny summary judgment even where it would be technically proper, so that the case may be fully developed at trial. *Roberts* v. *Browning,* 610 F.2d 528, 536 (8th Cir.1979).

That development has now occurred, and it is apparent that there are no genuine issues of material fact concerning the single entity question. The parties' disagreement concerns the legal effect to be given to the undisputed facts. The question is a close one, and the court has benefitted greatly from the briefs and oral arguments of the parties. Careful consideration of the legal arguments put forward by the Coliseum and by the NFL have convinced this court that the undisputed facts preclude treating the NFL as a single entity for purposes of this lawsuit.

On its face, the NFL certainly appears to be an association of separate business entities rather than one single enterprise. The twenty-eight member clubs are separate legal entities—some corporations, some partnerships, and some sole proprietorships. No two clubs have a common owner. The clubs share a large part, but not all, of their revenues. They do not share their profits or losses. They are managed independently, each making its own decisions concerning ticket prices, player acquisitions and salaries, the hiring of coaches and administrators, and the terms of their stadium leases. They do not exchange or share their accounting books and records.

The Supreme Court has consistently rejected the single-entity argument in circumstances more favorable to that argument than those presented in this case. Firms with a high degree of common ownership have been held separate for Sherman Act purposes. *See Timken Roller Bearing Co.* v. *United States,* 341 U.S. 593, 597-98, 71 S.Ct. 971, 974, 95 L.Ed. 1199 (1951); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,*

Inc., 340 U.S. 211, 215, 71 S.Ct. 259, 261, 95 L.Ed. 219 (1951); *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 227-28, 67 S.Ct. 1560, 1565, 91 L.Ed. 2010 (1947). Indeed, even a parent corporation and its subsidiary have been held separate entities in a Sherman Act context: since they had "availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities." *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42, 88 S.Ct. 1981, 1985-86, 20 L.Ed.2d 982 (1968).

The Ninth Circuit has taken a similarly unreceptive view of single-entity claims, as demonstrated by *Knutson* v. *Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910, 97 S.Ct. 2977, 53 L.Ed.2d 1094 (1977). The defendants there were two newspaper-publishing corporations, one a wholly-owned subsidiary of the other. The Ninth Circuit was reluctant to characterize these firms as a single entity for Sherman Act purposes, stating only (in dictum) that they were "[a]rguably" one enterprise. Yet not only were the two firms parent and subsidiary, but one individual had control of the parent, was president of both corporations, and published all of both companies' newspapers. Moreover, the firms shared many key personnel, their newspapers exhibited numerous common features, and the two companies did not compete. If all these features together were insufficient to establish a single enterprise, it is difficult to see how the NFL can constitute a single entity when it possesses *none* of those features.[1]

The League argues, however, that the unitary nature of the product it creates—NFL football—necessarily implies that it is a single entity. "[T]he economic substance is that of a single firm selling a single product involving a necessary contribution from each member." *NFL Opposition* at 3. This argument suffers from several defects.

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[1] The NFL is not the "parent" of any league member, nor do any two clubs have a common owner. The clubs do not share key operational personnel. And the NFL itself has conceded that "the existence of actual or potential interclub competition in certain areas is not disputed." *NFL's Opposition to Motion for Partial Summary Judgment*, filed February 20, 1981 [hereinafter *NFL Opposition*], at 29.

In the first place, the argument, if valid, would prove too much. If the NFL must be treated as a single entity in this lawsuit simply because all its teams must cooperate to produce the League product, the NFL should be just as much a single entity—and hence just as incapable of violating section 1 of the Sherman Act—in cases challenging League restrictions on the acquisition of players. Yet such League rules have repeatedly been found to violate section 1. *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173 (D.C.Cir.1978); *Mackey* v. *NFL*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977); *Kapp* v. *NFL*, 390 F.Supp. 78 (N.D.Cal.1974), *aff'd on other grounds*, 586 F.2d 644 (9th Cir.1978).[2]

Secondly, organizations whose product is just as unitary as the NFL's and requires the same kind of cooperation from the organization's members, have been found to violate section 1 of the Sherman Act. The clearest instance is *Associated Press* v. *United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945), where Associated Press bylaws aimed at preventing competitors of existing members from joining the association were held unlawful. Associated Press was an incorporated membership association whose members were newspapers. It gathered and distrubuted "news which [its] member papers cannot collect single-handed, and which requires their pooled resources." *Id.* at 26 (Frankfurter, J., concurring). This was a product or service distinct from that of the member publishers, and one requiring the cooperation of all the members, none of whom

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[2] The NFL argues that the player cases are distinguishable because they challenged NFL conduct in a different market—the market for player services, rather than the market in which NFL football is sold. "In the player market club had the capacity to employ players without necessarily involving other clubs in such contracts." *NFL Opposition* at 39. The distinction is unconvincing. Each club likewise has the capacity to lease a stadium without involving the other clubs in its contract. Of course, the other clubs will be "involved" in the sense that they will have to play in the leased stadium. But they are similarly "involved" when one club employs a player in the sense that they will have to play against that player. In short, players no less than stadiums are a factor in producing professional football, and if the nature of professional football makes its producer, the NFL, a single entity, that conclusion would apply as much in the player market as in the stadium market.

had the facilities or resources to produce AP's stream of worldwide news. Yet the Court had no trouble finding AP's anticompetitive bylaws a restraint of trade.[3] Likewise, in *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 365, 83 S.Ct. 1246, 1261, 10 L.Ed.2d 389 (1963), the Court held that the Exchange had violated section 1 of the Sherman Act. Yet the Exchange "perform[ed] an important function" by "serv[ing] . . . as an indispensable mechanism through which corporate securities can be bought and sold"—a function that none of its individual broker-members could perform on its own. *Id.* at 349, 83 S.Ct. at 1253.[4]

A third problem with the NFL's argument is that it seems to rest on a false premise—that the individual NFL clubs are not separate business entities whose products have an independent value. The League may be correct when it characterizes its member clubs as "[e]ntities which have capacity to be competitors *only* when acting jointly with members of a common enterprise." *NFL Brief on Cross-Motions for Directed Verdict re Single Entity*, filed July 23, 1981 [hereinafter *NFL Brief*], at 21. But this means only that each club must act jointly with *some* other teams in *some* cooperative framework in

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[3] *See also United States* v. *General Motors Corp.*, 121 F.2d 376 (7th Cir.), *cert. denied*, 314 U.S. 618, 62 S.Ct. 105, 86 L.Ed. 497 (1941), affirming the conviction of four corporations for violating section 1 of the Sherman Act. The defendants were GM, its sales and financing subsidiaries GMSC and GMAC, and a subsidiary of GMAC. The defendants had argued that they all directed their operations "toward one end, the manufacture and sale of General Motors automobiles," *id.* at 384, and that GMAC and its subsidiary were thus merely parts of one common enterprise engaged in the unitary business of making and selling GM cars. The court rejected this defense. *Id.* at 404.

[4] The NFL would distinguish *Associated Press* and *Silver* as involving "organizations made up of firms, each of which were self-contained competitors separate and independent of their membership in the umbrella cooperative," unlike the NFL's member clubs. *NFL Brief* at 22. This is not, in the court's view, a "distinction of substance" as the NFL believes. *Id.* at 23. As discussed below, any individual NFL team could, in theory, withdraw from the NFL and join or found a new league. A team could even withdraw and try to present non-league exhibition games, as the Harlem Globetrotters do. Such a venture might be almost certain to fail—but then so would a stock broker who decided to quit the New York Stock Exchange and operate without a seat on any exchange.

order to produce football games. It does not show that each club can produce football games only as an *NFL* member. Indeed, many of the current NFL members—including plaintiff Raiders—previously operated as members of a rival football league. There is no conceptual reason why any NFL team could not decide to pull out and join a new league.[5] Thus, although the Raiders can create a product only in collaboration with other teams, it does not follow that they "have no capacity to be competitors separate and apart from their membership in the National Football League." *NFL Brief* at 29. Indeed, sports fans quite often wish to spend their money on the games of a particular team, not simply on "NFL football," "NBA basketball," or the like.[6]

Besides stressing its allegedly unitary product, the NFL relies principally on *North American Soccer League* v. *NFL*, 505 F.Supp. 659 (S.D.N.Y.1980), and *San Francisco Seals, Ltd.* v. *National Hockey League*, 379 F.Supp. 966 (C.D.Cal.1974). But these cases do not help the League in this lawsuit, for they arose in far different contexts. The *North American Soccer League* case arose in the very different setting of a clash between two separate professional sports leagues, and Judge Haight specifically noted that the single entity defense "fails where two member teams would compete in the

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[5] The NFL might insist that although an individual club could secede from the League and continue to take part in producing football games, it would not be producing *NFL football*. But that is a mere tautology and in no way shows that the League's product has a special unitary quality. Even that most blatant coalition of competing enterprises, charged with a Sherman Act violation, could argue that no other entity except the coalition itself could produce a "coalition product": this would not mean that every such coalition must be considered a single business entity.

[6] For this reason, the NFL's analogy with *Evans* v. *S. S. Kresge Co.*, 544 F.2d 1184 (3d Cir.1976), is unconvincing. *NFL Brief* at 19-20. That case involved a retailer, Hempfield, who operated the grocery departments of a number of defendant's K-Mart stores. The court found an absence of competition, since from a customer's viewpoint, "whether the . . . item was purchased from Kresge or from Hempfield, it was as if the item had been offered for sale by Kresge alone, but at two different locations in its K-Mart establishment." 544 F.2d at 1193. In our case, by contrast, few football fans would regard a Raiders game and, say, a Jets game as merely "NFL football" dispensed at different locations.

same geographical area for sports' fans dollars, and league restraint of that competition damages a stadium operator"—the precise situation alleged here. 505 F.Supp. at 677, *San Francisco Seals* turned on a finding that denial of the Seals's proposed move to Vancouver had no anticompetitive effect. That finding cannot automatically be transferred to this case, because the Seals, unlike the Raiders here, were not being prevented from moving into another team's home territory.

For the foregoing reasons, the court concludes that the NFL's member teams should be treated as separate business enterprises for purposes of this lawsuit, rather than as components of a single business entity. The NFL's arguments are by no means without force if marshalled in an attempt to demonstrate that the competitive activity of the NFL's teams presupposes a degree of mutual cooperation perhaps unique to the world of professional sports. But such unique features are relevant in weighing the reasonableness of the restraint at issue in this case—a task for the jury—and do not suffice to exempt that restraint from antitrust scrutiny altogether by establishing a single entity defense.

THEREFORE, IT IS ORDERED that the motions of the Coliseum Commission and the Raiders for directed verdict on the single entity issue be granted, and the NFL's motion be denied.

The Clerk of the Court is directed to serve copies of this order by United States mail upon the attorneys of record appearing for the parties herein.

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 78-3523-HP

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff,
vs.
NATIONAL FOOTBALL LEAGUE,
an unincorporated association, et al.,
Defendants.

OAKLAND RAIDERS, LTD.,
Cross-Claimant,
vs.
NATIONAL FOOTBALL LEAGUE,
an unincorporated association, et al.,
Cross-Defendants.

OAKLAND-ALAMEDA COUNTY COLISEUM, INC.
Intervenor.

ORDER DENYING MOTION FOR CHANGE OF VENUE

This matter is before the court on the National Football League's motion for change of venue. Having considered the pleadings, the affidavits, the memoranda of law, and the oral argument of counsel, the court has concluded that the motion for change of venue should be denied.

The NFL's motion, based on 28 U.S.C. § 1404(a), seeks to transfer the case out of the Central District of California. The NFL argues that its due process rights to a fair trial would be denied by holding a trial in Los Angeles, where, the NFL argues, a jury would likely be predisposed to favor the transfer of a second NFL franchise to the Los Angeles Coliseum. The NFL further claims that a transfer is necessary to avoid the risk of a verdict based on juror prejudice, financial interest, and the influence of pretrial

publicity. The defendant Los Angeles Rams join in the NFL's motion. Before evaluating the factors to be considered in ruling on a motion under section 1404(a), a brief review of the history of this case and some of the issues involved may be in order.

I. BACKGROUND

The Los Angeles Coliseum Commission originally filed its complaint against the NFL on September 13, 1978. The complaint sought to have sections 3.1 and 4.3 of the NFL Constitution and Bylaws, which required a unanimous vote of all NFL teams to permit a transfer of a team's home location, declared invalid as a restraint of trade violative of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. In an order filed February 28, 1979, this court dismissed the complaint with leave to amend on the ground that plaintiff had not adequately alleged standing to bring the action. *Los Angeles Memorial Coliseum Commission v. N.F.L.* ("Coliseum I"), 468 F.Supp. 154 (C.D.Cal. 1979). Plaintiff filed a second amended complaint for injunctive relief on March 5, 1979.

The next major event in the case occurred on January 18, 1980, when plaintiff filed a motion for a preliminary injunction against the NFL. The court was told that the Oakland Raiders Football Club had agreed to move its home location to the L.A. Coliseum but that an injunction was necessary to prevent the NFL from blocking the move by requiring, under its newly amended transfer rule, the approval of three-quarters of the NFL members. After a hearing held on February 4, 1980, and the filing of several supplemental briefs, this court granted a preliminary injunction against the NFL in an order filed on February 21, 1980. *Los Angeles Memorial Coliseum Commission v. N.F.L.* ("Coliseum II"), 484 F.Supp. 1274 (C.D.Cal. 1980). The Ninth Circuit subsequently stayed the order pending appeal, and later reversed, in an opinion filed December 12,

1980, for lack of a showing of irreparable injury. *Los Angeles Memorial Coliseum Commission v. N.F.L.*, 634 F.2d 1197 (9th Cir. 1980).

In the meantime, the L.A. Coliseum Commission filed a third amended and supplemental complaint adding a damage claim to their claim for injunctive relief. Shortly thereafter, the defendant Oakland Raiders filed a cross claim against the NFL for damages and an injunction. Although the L.A. Coliseum's jury trial demand was included in its third supplemental complaint, filed on March 7, 1980, the Coliseum subsequently indicated a desire to try the case without a jury.[1] The NFL, however, has demanded its right to a trial by jury.

Trial was originally scheduled for November 18, 1980.[2] The NFL's motion for change of venue was filed on September 8, 1980. The motion was taken under submission after oral argument on September 30th. Intensive settlement discussions were held on numerous occasions from October 1980 until February 4, 1981. The Oakland-Alameda County Coliseum was permitted to intervene in the suit by an order filed on January 16, 1981. Supplemental memoranda on the motion for change of venue were received on January 14, January 23, January 29, February 4, February 20, February 24, March 6, and March 12, 1981. Discovery having been substantially completed, several motions for partial summary judgment were filed. Remaining at issue are the following basic claims: (1) the claims of the L.A. Coliseum and the Oakland Raiders that the NFL's three-quarters vote requirement for approval of

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[1]On February 2, 1981, the L.A. Coliseum filed a motion under Fed.R.Civ.P. 42(b) for a separate, non-jury trial of its equitable claims, to be held before the jury trial on the Oakland Raiders' cross claims. An order denying the motion was filed after a hearing on February 24, 1981. A copy of that order is attached as Appendix I.

[2]Pursuant to an October 30, 1980 agreement of counsel, the trial date was continued to February 9, 1981. This date was subsequently rescheduled for March 23, 1981.

transfers is both a restraint on trade and an attempt to monopolize, in violation of sections 1 & 2 of the Sherman Act; (2) the L.A. Coliseum's claim for tortious interference with contractual advantage and business relations; and (3) the Oakland Raiders' claim that the NFL's conduct in blocking the Raiders' move to Los Angeles is a breach of the duty of fair dealing. The NFL has responded with the following basic defenses: (1) since the NFL acts as a "single economic entity" in deciding where NFL football will be marketed, the "multiple actors" requirement for a section 1 violation has not been met; (2) blocking the move of the Oakland Raiders to Los Angeles has no substantial effect on competition; (3) the NFL's rule on transfers is valid under the rule of reason and was reasonably applied; (4) the proposed contract between the L.A. Coliseum and the Oakland Raiders would not have received the necessary approval of the appropriate governmental bodies; and (5) the Oakland Raiders Club is precluded from recovering any damages, based on the invalidity of the transfer rule, because of the club's adoption of the bylaws containing the rule and its failure to exhaust intra-league remedies. Trial is scheduled to begin on March 23, 1981.

II. FACTORS TO BE CONSIDERED UNDER SECTION 1404(a)

The statute on which the motion for transfer is based, 28 U.S.C.§ 1404(a), reads as follows:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

In ruling on a transfer motion, a district court must consider each of the issues listed in section 1404(a): (1) the convenience of parties; (2) the convenience of witnesses; and (3) the interests of justice. *Kasey v. Molybdenum*

Corp., 408 F.2d 16, 20 (9th Cir. 1969). Moreover, since section 1404(a) was "designed as an attempt to statutorily embody and modify the doctrine of forum non conveniens," *A.J. Industries, Inc. v. United States District Court*, 503 F.2d 384, 386 (9th Cir. 1974), the factors weighed by courts under the old common law doctrine of *forum non conveniens* should also be considered. This remains true even though the court's discretion under section 1404(a) is broader than it was under the doctrine of forum non conveniens. *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955). Some of those factors, discussed by the Court in *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501, 508-09 (1974), are as follows:

> the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. . . . relative advantages and obstacles to fair trial.

The basic factors to be considered then, in determining whether, on balance, a transfer to a different forum would allow a case to proceed more conveniently and better serve the interests of justice, are: (1) the plaintiff's choice of forum; (2) the convenience of the parties; (3) the convenience of the witnesses; and (4) the interests of justice.

A. *Plaintiff's Choice of Forum*

The burden of establishing that an action should be transferred is on the moving party. 1 *Moore's Federal Practice* ¶ 0.145[5], at 1615 (2d ed. 1980); 15 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3848, at 244 (1976); *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979); *Factors Etc., Inc. v. Pro Arts, Inc.*, 579 F.2d 215, 218 (2d Cir. 1978),

cert. denied, 440 U.S. 908 (1979). It has also been stated that the plaintiff's choice of venue should not be lightly disturbed. 1 *Moore's Federal Practice, supra* ¶ 0.145[5], at 1616; *Northern Acceptance Trust 1065 v. Gray,* 423 F.2d 653, 654 (9th Cir.), *cert. denied,* 398 U.S. 939 (1970). This is particularly so when the forum chosen is not only the plaintiff's domicile but also has a significant connection with the subject matter of the case. *See, e.g., Pacific Car and Foundry Co. v. Pence,* 403 F.2d 949, 954 (9th Cir. 1968); *American Can Co. v. Crown Cork & Seal Co.,* 433 F.Supp. 333, 338 (E.D.Wis. 1977); *Mayer v. Development Corp.,* 396 F.Supp. 917, 932 n.26 (D.Del. 1975). Moreover, the defendant's burden on a transfer motion is said to be especially heavy in antitrust suits, where plaintiff's choice of forum is entitled to particular respect. *See Ford Motor Co. v. Ryan,* 182 F.2d 329 (2d Cir.), *cert. denied,* 340 U.S. 851 (1950); *Star Lines, Ltd. v. Puerto Rico Maritime Shipping Authority,* 442 F.Supp. 1201 (S.D.N.Y. 1978).

The plaintiff Los Angeles Coliseum Commission has its headquarters or "domicile" in Los Angeles. Its suit was prompted by the departure of the Los Angeles Rams from the Los Angeles Coliseum and the Coliseum's subsequent inability, allegedly due to the NFL's rule on transfers, to find a replacement NFL tenant. The NFL meeting at which the league formally voted not to approve a transfer of the Oakland Raiders to Los Angeles was held within the Central District. Plaintiff thus claims that this district is where "the defendant . . . committed violations of the Act and inflicted the forbidden injuries." *Pacific Car and Foundry Co.,* 403 F.2d at 954, *quoting, United States v. National City Lines,* 334 U.S. 573, 583 (1948). *See also Commodity Futures Trading Comm'n v. Savage,* 611 F.2d at 278-79. Moreover, one of the NFL's defenses is that the Coliseum's proposed agreement with the Raiders would not have received the approval of the appropriate Los Angeles City and County officials. The NFL also challenges plaintiff's

argument that the addition of another NFL team in the Los Angeles area would have a significant effect on local competition for players, coaches, and fans. The Central District thus has a significant connection with the subject matter of the case, and plaintiff's choice of this forum is entitled to considerable weight.

As the "Background" section indicated, the motion for change of venue was filed two years after the filing of the original complaint, and six months after the Coliseum first demanded a jury. Although section 1404(a) sets no limit on the time at which a transfer motion may be made, the passage of time is a factor to be considered. *Adler v. McKee,* 92 F.Supp. 613 (S.D.N.Y. 1950). Delays of five months have induced courts to refuse transfers that might otherwise have been granted. *See McGraw-Edison Co. v. Van Pelt,* 350 F.2d 361, 364 (8th Cir. 1965) (en banc); *Metropolitan Life Ins. Co. v. Potter Bank and Trust Co.,* 135 F.Supp. 645 (W.D.Pa. 1955). *See also Securities & Exchange Comm'n v. Savoy Industries, Inc.,* 587 F.2d 1149, 1156 (D.C.Cir. 1978), *cert. denied,* 440 U.S. 913 (1979); *Henry v. First Nat'l Bank,* 50 F.R.D. 251 (N.D.Miss.), *vacated on other grounds,* 444 F.2d 1300 (5th Cir. 1971), *cert. denied,* 405 U.S. 1019 (1970) (transfer motion, filed three months after the filing of the original complaint, was denied because several motions and preliminary injunction had already been decided).

Finally, the NFL has not requested transfer to any specific district, but has merely suggested several possible alternative locations, e.g., Las Vegas, Phoenix, Sacramento, and Portland. The arguments with respect to transfer have therefore been made in the abstract—the NFL claiming, in essence, that any forum would be better than Los Angeles. The fact that the plaintiff's choice of forum is its home district, however, has been considered sufficient to defeat a motion for transfer, absent concrete indications as to why another *particular* forum was better. *Industrial Solvents Corp. v. Towboat Valley Voyager,* 388 F.Supp. 1055, 1057 (S.D.N.Y. 1975).

B. *Convenience of the Parties*

The present forum serves the convenience of the parties because the plaintiff, the defendant Rams, most of the attorneys, and many of the witnesses are located here. Moreover, the litigation has proceeded in this court for over two years. *See, e.g., Commodity Futures Trading Comm'n,* 611 F.2d at 279 ("The district court was familiar with the case and transfer may have led to delay."); *Securities & Exchange Comm'n v. Savoy Industries, Inc.,* 587 F.2d at 1156 ("'[R]elative docket congestion and potential speed of resolution is an appropriate factor to be considered.' . . . [N]ot only would delay from a crowded docket be present, but also the delay associated with the [transferee] district court's having to prepare itself for this complicated case.").

The NFL has not shown that the present forum is inconvenient for it. Indeed, counsel for both the NFL and the Rams are located here. Therefore, the cost to the NFL, the Rams, and Plaintiff of having to transport their counsel to, and house them in, another district, for what the NFL estimates will be a three to five month trial, would no doubt be considerable. *See Altman v. Deramus,* 342 F.Supp. 72, 76 (S.D.N.Y. 1972); *Mobil Oil Corp. v. W. R. Grace & Co.,* 334 F.Supp. 117, 124 n.5 (S.D.Tex. 1971) ("The cost of counsel's transportation and time in route must be borne by the parties. Therefore this factor directly bears upon the convenience of the parties and costs of litigation."). Thus, unlike the usual transfer motion, where the court is asked to balance an increase in costs for one party against a significant decrease in the costs of another, the transfer requested here would result in greatly increased costs for every party to the suit. The convenience of the parties is therefore another factor weighing against transfer of this action under section 1404(a).

C. *Convenience of Witnesses*

The convenience of witnesses is said to be the most important factor in passing on a transfer motion. *Saminsky v. Occidental Petroleum Corp.*, 373 F.Supp. 257, 259 (S.D. N.Y. 1974); 15 Wright, Miller & Cooper, *supra*, § 3851, at 264 ("If the forum chosen by plaintiff will be most convenient for the witnesses, this is a powerful argument against transfer.").

In assessing the effect of a transfer on the convenience of witnesses, courts consider the effect of a transfer on the availability of certain witnesses, and their live testimony, at trial. *E.g., B.J. McAdams, Inc. v. Boggs,* 426 F.Supp. 1091, 1104-05 (E.D.Pa. 1977); *Commercial Solvents Corp. v. Liberty Mutual Ins.*, 371 F.Supp. 247 (S.D.N.Y. 1974); *Polaroid Corp. v. Casselman,* 213 F.Supp. 379, 382 (S.D. N.Y. 1962) ("Depositions, deadening and one-sided, are a poor substitute for live testimony especially where, as here, vital issues of fact may hinge on credibility.").

Witnesses may not be compelled to attend trial unless they can be served with subpoenas within the trial district, or at any place outside of the district that is within 100 miles of the place of trial. Fed.R.Civ.P. 45(e). Thus, transfer may be denied when witnesses either live in the forum district or are within the 100-mile reach of the subpoena power. 15 Wright, Miller & Cooper, *supra* at 267-68; *B.J. McAdams, Inc. v. Boggs, supra* (transfer refused where plaintiff asserted that compulsory process might be necessary to secure the live testimony of witnesses who could not be compelled to testify in the proposed transferee district); *U.S. Industries, Inc. v. Procter & Gamble Co.*, 348 F.Supp. 1265 (S.D.N.Y. 1972).

Plaintiff claims that many of its witnesses will be beyond the court's subpoena power if transfer is granted. Among the witnesses, whose names and testimony plaintiff has specified, are members of the Los Angeles County Board of

Supervisors, representatives of other Coliseum tenants, and the owners of the Los Angeles Rams and the San Diego Chargers. The last two names, those of the Rams and Chargers owners, are also contained in the NFL's tentative witness list, filed January 14, 1981. The NFL, on the other hand, has not indicated that a transfer is necessary for the convenience of any of its witnesses. The factor of convenience of witnesses therefore provides additional support for denial of the requested transfer.

D. *Interest of Justice*

Many considerations have been evaluated by courts under the heading "the interest of Justice." One such consideration is whether a speedier trial may be had in one court than another. Transfer has been denied where, as here, a speedier trial could be had where suit was brought than in the proposed transferee court. *E.g., National Super Spuds, Inc. v. New York Mercantile Exchange,* 425 F.Supp. 665 (S.D.N.Y. 1977); *In re Fenwick Island, Inc.,* 330 F.Supp. 1191 (E.D.N.C. 1971); *Vandusen v. J.C. Penney Co.,* 207 F.Supp. 529, 536 (W.D.Ark. 1962).

The most important "interest of justice" consideration before the court in this case is the defendants' claim that transfer is necessary to avoid the risk of an unfair trial. As part of this claim, defendants argue that jurors in the Central District have been exposed to excessive and adverse pretrial publicity. Defendants also argue that jurors in the Central District would screen evidence "through a filter of local financial and political interests, including the real or perceived financial impact of the Raiders' arrival in Los Angeles and the effect of a second NFL franchise on the area's spiritual and economic well-being." These two proposed bases for a transfer—pretrial publicity and juror bias—will be discussed in turn. First, however, it may be helpful to have in mind some background information on the nature of this judicial district.

1. *Background*

The Central District of California comprises the counties of Los Angeles, Orange, Riverside, San Bernardino, San Luis Obispo, Santa Barbara, and Ventura. 28 U.S.C. § 84. Although the Los Angeles Coliseum is located in Los Angeles County, the Big "A" Stadium, in which the defendant Los Angeles Rams play, is located in the City of Anaheim in Orange County. The combined population of these seven counties is approximately 10 million. Excluding Orange and Los Angeles counties, the combined population of the Central District's five other counties is approximately three million. Residents of the Central District engage in many forms of recreation, from hiking and skiing to surfing and spectator sports. Some are fans of local college or nonprofessional teams, while others may root for a variety of professional teams, including the Los Angeles Dodgers, the California Angels, the Los Angeles Lakers, the Los Angeles Kings, and the Los Angeles Aztecs. Still others are probably wholly oblivious to team sports. Such persons may turn for entertainment to the symphony, a wide variety of music and night clubs, visiting ballets and operas, community theater, church groups, films, or, perhaps even gardening or reading. Thus, the population of the Central District is highly diverse, and its residents are far from homogeneous in their interests and backgrounds.

2. *Pretrial Publicity*

Both the NFL and the defendant Rams argue that it will be impossible for them to receive a fair trial in Los Angeles due to "prolonged, extensive, and highly prejudicial" pretrial publicity. In affidavits supporting and opposing the transfer motion, the parties have filed copies of hundreds of articles on various aspects of the case which have appeared in numerous newspapers over the course of a year. According to the affidavits, radio and television stations have also given extensive coverage to this litiga-

tion. Defendants focus particular attention on articles published by a local newspaper which, although it has a relatively small circulation, is alleged to be particularly biased against the defendants. *See Los Angeles Coliseum Commission v. NFL*, ... F.Supp. ....., No. 78-3523-HP (C.D.Cal., filed Jan. 5, 1981) (memorandum and order granting motions to quash subpoenas served on two *Herald Examiner* reporters). While defendants claim that local media coverage "has consisted in large part of vitriolic attacks on the league, its personnel and its membership," many of the articles filed with this court appear to contain straightforward and neutral reports on the progress of this litigation. Other articles are sharply critical of the Raiders' management and express doubts about the legality or fairness of certain aspects of the Raiders' proposed agreement with Los Angeles Coliseum. Although the affidavits support the defendants' claim that "[e]very major courtroom event has been reported by the local press," this fact alone does not justify transfer of the case. Moreover, it should be kept in mind that jurors in the Central District hail from Orange County and five other counties besides Los Angeles, and that the defendant Rams have asserted, in a motion to exclude certain evidence from trial, that "It is certain . . . that wherever the action is tried, intense press coverage will continue."

Defendants argue that the pretrial publicity in this district requires the court to grant a transfer, as a matter of due process, even before the court has an opportunity to determine the effect of this publicity in the context of voir dire proceedings. Numerous cases are cited which purportedly support this proposition. On careful reading of these precedents, however, the court concludes that defendants' pretrial publicity argument is based on two types of authority: (1) dicta from cases having nothing to do with either transfers of venue or pretrial publicity, and (2) standards evolved in criminal cases in which

extreme and virulent pretrial publicity was found to be coupled with demonstrated effects on prospective jurors.

Citations which fall into the first category include the following Supreme Court cases: *Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1 (1976); *Matthews v. Eldridge,* 424 U.S. 319 (1976); and *Goldberg v. Kelly,* 397 U.S. 254 (1970). In *Greenholtz v. Nebraska Penal Inmates,* the Court rejected a due process challenge to prison parole procedures. *Matthews v. Eldridge* held that states were not required to provide an evidentiary hearing prior to the termination of social security benefits. Finally, in *Goldberg v. Kelly,* cited for the proposition that "factfinding based on assertions of fact contained in extra-judicial sources, or upon political, social or financial persuasions occurring outside the record is erroneous factfinding," the Court held that New York City procedures for termination of public assistance payments to welfare recipients did not meet the requirements of procedural due process. Those procedures, among other things, failed to permit welfare recipients to appear personally before the officials charged with making the final decision on the recipients' continued eligibility.

Other cases falling into the first category include *In re Japanese Electronics Products Antitrust Litigation,* 631 F.2d 1069 (3d Cir. 1980); *United States v. Allsup,* 566 F.2d 68 (9th Cir. 1977); *Kiernan v. Van Schaik,* 347 F.2d 775 (3d Cir. 1965); and *In re Union Leader Corp.,* 292 F.2d 381 (1st Cir. 1961). In *In re Japanese Electronics Products,* the Third Circuit held that the Seventh Amendment does not guarantee a right to a trial by jury when a lawsuit is so complex that the jury would not be able to perform its task of rational decision making with a reasonable understanding of the evidence and relevant legal rules. *United States v. Alsup* was a bank robbery case in which the court refused to excuse for cause two prospective jurors who worked for the bank that had been robbed. This and other

cumulative errors were held to have resulted in a denial of the defendant's right to a fair trial. *Kiernan v. Van Schaik,* cited for the proposition that "it is well settled that *any* extraneous influences that threaten to deprive a civil litigant of an impartial jury are grounds for transfer," held that the trial court abused its discretion in refusing to seek voir dire questions about prospective jurors' relationships with insurance companies. Finally, in *In re Union Leader Corp.,* cited for the proposition that "the right to be tried before an unbiased [trier of fact] is . . . basic to our judicial system," the First Circuit *denied* a petition for a writ of mandamus which sought to transfer a case away from a trial judge who had been personally attacked in many newspaper editorials published by the defendant.

Defendants' second category of authorities, in which extreme and virulent publicity was found to be coupled with demonstrated effects on potential jurors, are highly distinguishable from the instant case. For example, defendants cite five Supreme Court cases: *Sheppard v. Maxwell,* 384 U.S. 333 (1966); *Estes v. Texas,* 381 U.S. 532 (1965); *Rideau v. State of Louisiana,* 373 U.S. 723 (1963); *Irvin v. Dowd,* 366 U.S. 717 (1961); and *Marshall v. United States,* 360 U.S. 310 (1959).

In *Sheppard v. Maxwell,* 384 U.S. 333 (1966), massive and outrageous publicity, both before and during trial, was coupled with the refusal of the trial judge either to question the jurors on whether they had heard certain highly prejudicial mid-trial broadcasts or to admonish the jury to ignore press accounts of the case. The defendant in the case was a doctor accused of murdering his wife. Prior to his indictment for murder, headlines, editorials, and cartoons asked rhetorically why the doctor was not already in jail. A continuous stream of articles purported to contain statements of the defendant and details of his alleged extramarital love affairs with numerous women. The trial began

just two weeks before the November general election, in which the chief prosecutor was a candidate for judge and the trial judge was up for re-election. Newspapers published the names and addresses of prospective jurors, who reported receiving numerous phone calls regarding the case. Nearly all the seats in the courtroom were assigned to reporters, whose photographs of the jurors were printed constantly in newspapers during the trial. Every juror stated at voir dire that they had read and heard about the case. The jury's visit to the scene of the alleged crime became a full-scale media event. Moreover, in addition to the judge's refusal to order the jury not to read press accounts of the trial, jurors were allowed to place phone calls during deliberations. On the one occasion the judge questioned the jury regarding publicity during the trial, two jurors admitted having heard the highly inflammatory charge that a prison inmate claimed the defendant was the father of her illegitimate child. According to the Supreme Court, "the judge never considered . . . means that are often utilized to reduce the appearance of prejudicial material and to protect the jury from outside influences." 384 U.S. at 358. The Court mentioned several ways of insulating jurors, such as regulating the conduct of journalists in the courtroom, insulating witnesses from interviews with reporters, controlling leaks of information by the prosecution, and proscribing extrajudicial statements by counsel and witnesses on certain prejudicial matters. The Court concluded that, despite the massive and highly prejudicial local publicity, "these procedures would have been sufficient to guarantee [the defendant] a fair trial . . . ." *Id.*

In *Estes v. Texas,* 381 U.S. 532 (1965), the Court was concerned with the impact of live TV and radio coverage of courtroom proceedings on the defendant's due process right to a fair and impartial trial. *Estes v. Texas* was therefore *not* a pretrial publicity case. Justice Clark's "majority"

opinion[3] reasoned that live TV cameras had a tendency to distract jurors, pressure witnesses, place extra burdens on the judge, transgress the dignity of the defendant, and interfere with his ability to concentrate. The Court has since characterized *Estes* as a trial lacking due process since "the volume of trial publicity, the judge's failure to control the proceedings, and the telecast of a hearing and of the trial itself" prevented a sober search for the truth. *Nebraska Free Press Ass'n. v. Stuart*, 427 U.S. 539, 552 (1975), Moreover, the Court in *Chandler v. Florida*, 101 S.Ct. 802 (1981), recently declined to construe *Estes* as laying down a per se constitutional rule barring live broadcast coverage under all circumstances.

In *Rideau v. State of Louisiana*, 373 U.S. 723 (1963), the Court held that the trial court's refusal of a request for change of venue was a denial of due process where the defendant's confession had been broadcast over TV throughout the district. The confession had been obtained by law enforcement officers who interviewed the defendant on tape without an attorney present. The Court also noted that two jurors were deputy sheriffs, who had been kept on the panel over defense counsel's objections.

In *Irvin v. Dowd*, 366 U.S. 717 (1961), the Court held that a trial which resulted in a conviction and death sentence violated the defendant's due process rights when two-thirds of the members of the jury admitted, before hearing

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[3]Justice Clark's opinion received the concurrences of Chief Justice Warren, and Justices Douglas and Goldberg, who also concurred in a separate concurrence by Chief Justice Warren. Justice Harlan concurred in the result, but indicated that the Court's holding should not be read to extend beyond the facts of the case, as he was not yet prepared to resolve the question addressed in the other concurrences as to whether all live TV coverage was inherently prejudicial. 381 U.S. at 587-96. Four other justices dissented in three separate opinions.

any testimony, their belief that the defendant was guilty. Police press releases publicized the defendant's confession to six murders. A barrage of headlines, articles, cartoons, and pictures continued for six or seven months preceding the trial. A change of venue to an adjoining county, which relied on the same news sources as the transferor district, was granted, but a second motion for change of venue was denied on the basis that state law only permitted one change of venue. Motions for a continuance were also denied. Radio and TV revealed the defendant's 20-year-old conviction for arson, a prior conviction for burglary, and a court-martial on AWOL charges during the war. The press also reported the defendant's offer to plead guilty if promised a 99-year sentence, the determination of the prosecutor to secure the death penalty, and the defendant's purported confession to 24 burglaries. Other highly emotional press stories suggested a "pattern of deep and bitter projudice" in the community, a pattern which was clearly reflected in the voir dire record.

Out of a panel of 430 potential jurors, almost 90% entertained an opinion as to guilt, ranging from mere suspicion to absolute certainty. And eight out of the twelve final jurors stated they thought the defendant was guilty. The facts in *Irwin v. Dowd* are thus quite obviously different from those presented by the instant motion. Nonetheless, the following statement from that opinion, which has been quoted in many opinions since, does have some bearing on the pretrial publicity claims of the defendants here:

> It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scracely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases.

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

366 U.S. at 722-23 (citations omitted.[4] Finally, in *Marshall v. United States,* 360 U.S. 310 (1959), jurors read, during the trial, newspaper accounts of the defendant's prior convictions for activities very similar to those for which he was on trial. This evidence had not been admitted at trial, and the Supreme Court ordered that a new trial be granted.

Thus, an analysis of the Supreme Court cases cited by defendants reveals that they involved not only massive pretrial publicity but also flagrant media intrusions during trial. The Court found that jurors had not been properly insulated from these intrusions. Moreover, all five of the cases involved criminal defendants, and in all but *Estes v. Texas,* the prejudicial effects of massive and virulent publicity on prospective and actual jurors was demonstrated.

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[4]*See also United States v. Ferreboeuf,* 632 F.2d 832, 835 (9th Cir. 1980) ("Ferreboeuf was not entitled to a jury composed only of persons who had no prior knowledge of her case."); *United States v. Lamb,* 575 F.2d 1310, 1315 (10th Cir.), *cert. denied,* 439 U.S. 854 (1978) ("[S]imply because a prospective juror admits having read newspaper accounts relative to a criminal charge is not in itself sufficient grounds for excusing a juror."); *Calley v. Callaway,* 519 F.2d 184, 205 (5th Cir. 1975), *cert. denied,* 425 U.S. 911 (1976) ("[N]o court has held that the only impartial juror is an uninformed one. We cannot expect jurors to live in isolation from the events and news of concern to the community in which they live."); 2 *The Unabridged Mark Twain: Roughing It* 740-42 (Running Press 1979)

More recent Supreme Court cases not cited by defendants are also instructive. In *Murphy v. Florida*, 421 U.S. 794 (1975), the issue was whether petitioner was denied a fair trial because members of the jury learned from news accounts about the defendant's prior felony conviction and aspects of the crime with which he was charged. In finding no due process violation, the Court referred to *Irvin v. Dowd*, *Rideau v. Louisiana*, *Estes v. Texas*, and *Sheppard v. Maxwell* as cases in which convictions had been obtained in a "trial atmosphere that had been utterly corrupted by press coverage." 421 U.S. at 798. The Court further distinguished those cases as follows:

> The proceedings in these cases were entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob. They cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process.

Moreover, the court noted that the voir dire record indicated "no . . . hostility to petitioner by the jurors who served in his trial." Similarly, in *Dobbert v. Florida*, 432 U.S. 282 (1977), the Court affirmed the conviction of a man whose trial on charges of torturing, abusing, and murdering children was accompanied by extensive pretrial publicity. The Court cited the *Irvin v. Dowd* quotation set out above, and noted that "the trial judge did everything possible to insure an impartial trial for the defendant," including a careful and extensive examination of prospective jurors. 432 U.S. at 302.

Although these cases indicate that the Court will look to the voir dire record to determine whether, as a result of pretrial publicity, potential jurors are prejudiced against

a party in the case, the defendants cite the following five district court cases for the proposition that the "pervasive pretrial publicity" in this case "dispenses with the need for, or utility of voir dire": *United States v. Marcello,* 280 F.Supp. 510 (E.D.La. 1968); *United States v. Parr,* 17 F.R.D. 512 (S.D.Tex. 1955); *Haase v. Gilboy,* 246 F.Supp. 594 (E.D.Wis. 1965); *United States v. Rossiter,* 25 F.R.D. 258 (D.P.R. 1960); and *United States v. Florio,* 13 F.R.D. 296 (S.D.N.Y. 1952). The first two of these cases involve communities which could be fairly described as "utterly corrupted by press coverage." The remaining cases, however, do not support the proposition for which they are cited. Moreover, defendants neglect either to cite or distinguish numerous other cases, particularly those in this circuit, that indicate that the proper occasion for determining whether a fair and impartial jury can be chosen is during voir dire.

In *United States v. Marcello,* 280 F.Supp. 510 (E.D.La. 1968), the defendant's motion for a change of venue from the Eastern District of Louisiana to the Southern District of Texas was granted. Shortly thereafter, however, the defendant moved the court to reconsider its grant of the requested transfer. According to the court, "[t]he only plausible motive supporting such bizarre conduct is that the defendant is now merely seeking to prepare a record for appeal in the event that he is convicted." 280 F.Supp. at 522. The court therefore refused to reconsider the order transferring the case to the Southern District of Texas. The court noted that the defendant had attracted "nefarious publicity" for many years in the transferor district as a "leader of the Cosa Nostra or Mafia in Louisiana." *Id.* at 516. Moreover, a photo showing the basis for the defendant's indictment on assault charges—the defendant

striking an FBI agent at an airport—was published conspicuously in local papers, along with stories about the desire of the governor of Louisiana to "get rid of Marcello." *Id.* at 517. For these reasons, the court stated it was "definitely of the opinion that the publicity which the defendant has received has been so highly pervasive in this area [i.e., the Eastern District of Louisiana] that it would prevent the defendant from receiving a fair and impartial trial in this state." *Id.*

In *United States v. Parr,* 17 F.R.D. 512 (S.D.Tex. 1955), the court, on the basis of newspaper clippings and affidavits, made a pre-voir dire finding that, since the defendant had been the subject of so much highly unfavorable publicity (involving a killing and political corruption), his trial for tax fraud should be moved to another district. In another case cited by defendants, however, the court specifically found that the question whether the defendant may be unable to obtain an unbiased jury was "premature." *Haase v. Gilboy,* 246 F.Supp. 594 (E.D.Wis. 1965). The court's grant of the requested transfer was therefore based on the "totality of circumstances," including the convenience of the witnesses and the fact that the case could come to trial earlier in the transferee district.

Similarly, the transfer in *United States v. Rossiter,* 25 F.R.D. 258 (D.P.R. 1960), was based on the ground that both the witnesses and the defendants, who were indigent, lived in the transferee district. Finally, in *United States v. Florio,* 13 F.R.D. 296 (S.D.N.Y. 1952), the last of the defendants' authorities for the proposition that the transfer should precede voir dire, a change of venue was was granted, prior to voir dire, because transfer was favored by both the defendant and the government. Indeed, Judge Kaufman noted in that case, but had no occasion to

rely on, the technique of voir dire "to minimize or exclude the effects of pre-trial publicity . . . ." 13 F.R.D. at 299.[5] Defendants' argument that transfer should be granted before voir dire is thus not only based on inapposite cases but also overlooks substantial authority in this and other circuits supporting the use of voir dire under similar circumstances.

It has long been recognized in this circuit that "[t]he effect of pretrial publicity can be 'better determined after the voir dire examination of the jurors.' " *Narten v. Eyman*, 460 F.2d 184, 187 (9th Cir. 1969). For example, in *Silverthorne v. United States*, 400 F.2d 627 (9th Cir. 1968), *cert. denied*, 400 U.S. 1022 (1971), Silverthorne's motion for a continuance on the ground that it was necessary to abate the effects of massive adverse publicity was denied by the trial court. The Ninth Circuit held that the denial of this motion was "in the sound discretion of the trial court and a denial of such a motion, prior to the voir dire examination, is not an abuse of that discretion." 400 F.2d at 634. This rule was held to apply to motions for change of venue as well in *Narten v. Eyman, supra.*

In *United States v. Polizzi*, 500 F.2d 856 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975), appellants claimed to have been prejudiced by pretrial publicity linking them to

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[5]Two other cases cited elsewhere in defendants' papers may be similarly distinguished. In *Canuel v. Oskoian*, 23 F.R.D. 307 (D.R.I. 1959), the defendant union's motion for change of venue on the basis of pretrial publicity and the existence of ongoing state legislative hearings involving the union's activities was denied. In *Wilson v. Great Atlantic & Pacific Tea Co.*, 156 F.Supp. 767 (W.D.Mo. 1957), the court denied the defendant's motion to transfer a wrongful death action brought by black plaintiffs because the defendant never answered plaintiffs' affidavits asserting that, among prospective jurors in the transferee district, there was a high degree of racial prejudice.

the Mafia. The court quoted the following standard for dealing with pretrial publicity from *Silverthorne v. United States*:

> "[T]he trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. . . . [W]hen pretrial publicity is great, the trial judge must exercise correspondingly great care in all aspects of the case relating to publicity which might tend to defeat or impair the rights of an accused. The judge must insure that the voir dire examination of the jurors affords a fair determination that no prejudice has been fostered." . . . In a case of *substantial* pretrial publicity, the voir dire must not simply call for the jurors' subjective assessment of their own impartiality, and it must not be so general that it does not adequately probe the possibility of prejudice.

500 F.2d at 879 (citations omitted). On the basis of these standards, the court then found that pretrial publicity had not been substantial enough to have required the trial judge to interrogate prospective jurors about it at length.

In *United States v. McDonald*, 576 F.2d 1350 (9th Cir.), *cert. denied*, 439 U.S. 830, 927 (1978), appellant had sought a change of venue under Fed.R.Crim.Proc. 21(a), which requires a change of venue when there is "so great a prejudice against the defendant that he cannot obtain a fair and impartial trial" in the transferor district. The court stated that "When a Rule 21(a) motion is made 'the ultimate question is whether it is possible to select a fair and impartial jury, and the proper occasion for such a determination is upon the voir dire examination.' " 576 F.2d at 1354 (citations omitted). Moreover, the court noted that "[t]he trial judge has 'a large discretion' in gauging the effects of allegedly prejudicial publicity and in taking measures to insure a fair trial." *Id.* The court therefore

held that appellant had not demonstrated that the district court abused its discretion in denying the motion for change of venue.

In *United States v. Giese,* 597 F.2d 1170 (9th Cir.), *cert. denied,* 444 U.S. 979 (1979), the court rejected appellant's argument that the district court had failed to safeguard his right to an impartial jury, uninfluenced by massive prejudicial pretrial publicity. Citing the voir dire standards established in *Silverthorne* and *Polizzi,* the court upheld the trial court's use of the more limited, general questioning technique on the ground that few jurors indicated they were influenced by, or had even seen, coverage of appellants' case in newspapers or on radio and TV. Finally, in *United States v. Ferreboeuf,* 632 F.2d 832, 834 (9th Cir. 1980), the court again quoted the following standard of review established in *United States v. Polizzi*: "Unless a trial judge clearly has erred in his estimation of the action needed to uncover and prevent prejudice from pretrial publicity, an appellate court should not intervene and impose its estimate." In upholding the voir dire procedures followed by the district court against the appellant's pretrial publicity claim, the court stated that the defendant "was not entitled to a jury composed only of persons who had no prior knowledge of her case." *Id.* at 835.

The practice in this circuit of waiting until voir dire to determine the availability of "fair and impartial jurors" is echoed in the opinions of many other courts. For example, in *United States v. Haldeman,* 559 F.2d 31 (D.C.Cir. 1976), *cert. denied,* 431 U.S. 933 (1977), the court reasoned that

> A judge reviewing pretrial publicity before the *voir dire* would have to attempt to determine from his own reactions how the community would respond to that publicity. . . . After the *voir dire* a judge can determine which description of the publicity's impact is accurate; before the *voir dire* a judge could only gave [sic]

> guessed. . . . Most of the venire simply did not pay an inordinate amount of attention to Watergate. This may come as a surprise to lawyers and judges, but it is simply a fact of life that matters which interest them may be less fascinating to the public generally.

559 F.2d at 62-63 n.37. The court therefore upheld the district court's refusal to grant pre-voir dire requests for a continuance or change of venue, stating that

> if an impartial jury actually cannot be selected, that fact should become evident at the *voir dire*. The defendant will then be entitled to any actions necessary to assure that he receives a fair trial.

Id. at 63. *See also United States v. Lamb,* 575 F.2d 1310, 1315 (10th Cir.), *cert. denied,* 439 U.S. 854 (1978) ("The proper occasion for determining juror partiality is upon voir dire examination."); *United States v. Caldwell,* 543 F.2d 1333, 1342 (D.C.Cir. 1974), *cert. denied,* 423 U.S. 1087 (1967); *United States v. Daddano,* 432 F.2d 1119, 1126 (7th Cir. 1970), *cert. denied,* 402 U.S. 905 (1971); *United States v. Cerilli,* 428 F.Supp. 801, 808 (W.D.Pa. 1977) ("In tune with the current cases of this Circuit and others, it is at least more expedient to wait until a thorough voir dire before a motion to change venue should be entertained.").

Finally, it should be noted that requests for pre-voir dire transfers are often supported by statistical evidence or the results of opinion polls. *See, e.g., United States v. Haldeman,* 559 F.2d at 64 n.43 (appellants presented a statistical analysis of the district's voting patterns and the results of a poll conducted by a public opinion research company); *United States v. Holder,* 399 F.Supp. 220, 228 (D.S.D. 1975) (survey data compiled on the district's high degree of racial prejudice). Since the defendants here have submitted no

such evidence, and since the copies of newspaper articles thus far submitted do not compel a conclusion, prior to voir dire, that six[6] fair and impartial jurors cannot be found in this district, the argument that the Central District is not a "fair and impartial" forum due to pretrial publicity must be rejected at this time. The court will remain open, however, to entertaining whatever motions defendants wish to make upon the conclusion of voir dire proceedings.

In the meantime, the court plans to conduct a thorough voir dire to elicit from individual potential jurors their awareness of prior publicity, and the existence of any disqualifying prejudice.[7] The court will also admonish the

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[6]Local Rule 13.1 of the United States District Court for the Central District of California provides that a jury for the trial of civil cases shall consist of six persons. *See Colgrove v. Battin* 413 U.S. 149 (1973).

[7]In examining jurors on pretrial publicity, the court's questioning may include the following:

> Have any of you read or heard anything about this case or either of the parties before coming into this courtroom? (If the answer is in the affirmative, then the examination of each juror on the effects of pretrial publicity will be conducted outside the presence of the other jurors.)
>
> What information about this case or any of the parties do you have? What was the source of your knowledge? What newspapers or magazines do you regularly read? What television news programs do you regularly view? What radio news programs do you regularly listen to? Have you ever read or heard anything about any of the following: (List specific issues and events submitted by the parties.)
>
> What information do you have on these matters? What was the source of your knowledge? How would your knowledge of the case, the parties, or any of these matters affect your attitude toward the trial and specifically toward the parties and the merits of this case? Do you have any opinion or impression about the merits? Do you have any preconceived notion about the merits of the case? Can you lay aside any preconceived notion or impression or opinion and render a verdict based solely on the evidence and on the court's instructions? Do you

jurors not to read any newspaper or magazine article, or to listen to any radio or television newscast about this case, or any of the parties involved, until they are discharged from further service as jurors in this case.[8] Finally, the court intends to grant all parties the maximum number of peremptory challenges allowable under 28 U.S.C. § 1870.

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understand that what we want is a trial by an impartial jury, that is, by jurors who have no bias or prejudice that would prevent them from returning a verdict according to the law and the evidence? Is that clear to you? Do you believe you are such a juror? Why?

[8]A complete admonition to jurors, to be given at least daily during the trial, might read as follows:

> Ladies and Gentlemen, at this time the court again admonishes you that you are not to discuss this case among yourselves or with anyone else until the case is finally submitted to you. The case will be submitted to you after you have heard all the evidence, the argument of counsel, and the court's instructions on the law that applies to the case.
>
> The court further admonishes you that you are not to read any newspaper or magazine article, or to listen to any radio or television newscast about this case, or any of the parties involved, until you are discharged from further service as jurors in this case.
>
> Now, ladies and gentlemen, you should not feel that you will be inconvenienced as a result of this order, because as a juror you will learn first-hand about this case right here in the courtroom. And I do not impose this order because of any lack of confidence in you. This order is imposed so that no one at any time in the future will be able to say that anything which may have appeared in print, or may have been broadcast on radio or television, during the course of this trial, had any influence on your deliberations or on your determination of the issues in this case.
>
> In addition, if during the course of the trial any publicity concerning this case comes to your attention, you are directed to notify the court of that situation at once in a signed note, which you should deliver to the bailiff.
>
> Another important matter: While the trial is in progress, give everyone connected with this case a wide berth—that includes

3. *Juror Prejudice*

Although defendants claim that potential Central District jurors have "emotional" or "political" biases prejudicial to defendants, there has been no attempt to compile any statistical or survey data to substantiate this claim. Moreover, since the court can easily imagine that many persons in this district have no interest in either professional sports or football, any decision on the extent of alleged "emotional" or "political" biases must await further substantiation in the context of the voir dire. It is necessary to turn then to the only aspect of defendants' bias claim on which there is both concrete evidence and substantial precedent, i.e., the claim that Central District jurors have a financial interest in the outcome of this case.

This claim is based on statements by L.A. Coliseum officials that the failure to secure the Raiders as a principal tenant will result in a deficit to be carried by local taxpayers. To support the argument that such an interest renders a forum inappropriate, the NFL cites a state statute requiring actions brought by a county, city or local agency against non-residents of that county or city to be transferred to a court in a community other than that in which the plaintiff is situated. CAL. CIV. PROC. CODE § 394(1). Since venue in the federal courts is statutory and procedural, however, neither the Rules of Decision Act, 28 U.S.C. § 1652, nor the doctrine of *Erie R.R. v. Tompkins*,

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the attorneys, the witnesses, and the parties. Don't even direct a "good morning" or "good evening" or exchange any sort of greetings with any of them because someone fifty feet away may misinterpret a routine courtesy. It is best that you give everyone connected with this case a very wide berth.

It is very important, ladies and gentlemen, that you strictly adhere to the court's admonitions. Again, keep in mind that you are going to get all the evidence you need to decide this case right here in the courtroom. It would be unfair to the parties and violate our system of justice for you to be subjected to any outside influences.

304 U.S. 64 (1938), applies, and state law cannot control federal venue. *See Miller v. Davis*, 507 F.2d 308, 316-17 (6th Cir. 1974) ("Federal courts should apply *federal* venue rules and need not follow contrary state law."); *Brown v. Pyle*, 310 F.2d 95 (5th Cir. 1962); *Taylor v. Titan Midwest Const. Corp.*, 474 F.Supp. 145 (N.D.Tex. 1979) (contractual venue provision enforced despite state law to the contrary); *R.S. Mikesell Assoc. v. Grand River Dam Authority*, 442 F.Supp. 229 (E.D.Okla. 1977).

In further support of its "financial interest" argument, the NFL cites *Withrow v. Larkin*, 421 U.S. 35 (1975); *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968); *Tumey v. Ohio*, 273 U.S. 510 (1927); and *Chestnut v. Ford Motor Co.*, 445 F.2d 967 (4th Cir. 1971). None of these cases, however, supports the proposition that prospective jurors who are taxpayers of a certain municipality should be disqualified from jury service in cases involving that municipality's governmental or quasi-governmental agencies.

The NFL relies on the following dicta in *Withrow v. Larkin*, 421 U.S. at 47:

> various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him.

This statement, however, was totally unrelated to any issue before the Court. In *Withrow*, the question was whether due process was violated by a state medical examining board which temporarily suspended a doctor's license at a contested hearing on charges evolving from the board's own investigation. The Court held that the district court had abused its discretion in issuing a preliminary injunction against the board since the district court's finding that

the doctor would likely succeed on the merits was clearly wrong. Thus, the Court in *Withrow* was faced neither with a claim that the Board had a financial interest in the outcome, nor that persons with an interest as attenuated as that alleged in this case should be barred from serving on a jury.

Similarly, *Commonwealth Coatings Corp. v Ohio,* 393 U.S. 145 (1968), rather than being a case involving taxpayer jurors, involved an arbitration, under the Federal Arbitration Act, of a dispute between a subcontractor and a prime contractor over money due on a painting job. The Supreme Court held that the subcontractor was entitled to have the arbitration award set aside when no one had disclosed to the subcontractor that the prime contractor was actually a regular customer of the third, and supposedly neutral, member of the arbitration panel.

In *Tumey v. Ohio,* 273 U.S. 510 (1927), the Court found that a municipal ordinance violated due process because it permitted a mayor, who sat as a judge for certain offenses, to collect his costs from the persons he convicted. In response to an issue raised by the municipality, the Court discussed whether a *citizen* of a municipality could sit as a juror where the city is a party or where the city, by receipt of fines, might benefit from a conviction or a ruling in its favor. While noting that such a practice might have been barred under the strict common law rule, the Court stated that "the strict rule seemed to be inconvenient, impracticable, and unnecessary and . . . such remote or minute interest in the litigation might . . . not . . . be a reason for disqualification of a judge or a juror." 273 U.S. at 528.[9]

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[9]The Court also quoted the following passage from *City Council v. Pepper,* 1 Rich. 364, 366 (S.C.):

> The sum thus to be recovered goes in exoneration of some part of the burden of government to which every citizen is subjected; but such an interest has no effect upon the mind. It is too slight to excite prejudice against a defendant.

273 U.S. at 530.

Similarly, *Connally v. Georgia*, 429 U.S. 245 (1977), cited by the defendant Rams, found that issuance of a search warrant violated due process where the issuing officer was not salaried, but received a statutory fee only on the *granting* of requested warrants. These cases thus involved statutory schemes by which triers of fact were directly compensated for reaching certain results, i.e., a conviction or a finding of probable cause for a search. In neither was it suggested that taxpayers should be disqualified as triers of fact for remote and unmeasurable interests in the possible effects of their decisions on sources of municipal revenues. Finally, in the last case cited by defendants, *Chestnut v. Ford Motor Co.*, 445 F.2d 967 (4th Cir. 1971), a juror was held to be disqualified because he owned stock in the defendant company.

A financial interest argument similar to that raised by the NFL was rejected in *Virginia Elec. Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 389 F.Supp. 568 (E.D.Va. 1975). In that case, a Virginia power company had brought an action against a Pennsylvania manufacturer for breach of contract. Noting that the forum district was served exclusively by the plaintiff power company, the defendant manufacturer moved for a change of venue. The defendant argued that all jurors living in the district would have a financial interest in the outcome by virtue of their consumption of electricity sold by the power company, and by the fact that, under Virginia law, the plaintiff would be required to pass along to its customers in rate reductions any substantial verdict it might win against the defendant. The prospective juror interest in the outcome in that case was thus not only district-wide but also more direct and foreseeable than that alleged here. The court denied the motion for transfer, however, on the ground that the defendant's approach was "a novel one. . . . without direct support from any authority [and] [i]f followed it would deny utilities their home venue in all except the most minor of cases."

389 F.Supp. at 571. The court noted that, of all the authorities cited, the one coming closest to answering the question was *Tumey v. Ohio,* discussed above. The court also observed that

> every United States Judge is a citizen of the United States and yet he is not considered disqualified to impose substantial fines payable to the United States. Jurors who are citizens of the Commonwealth of Virginia may impose substantial fines payable to the Commonwealth. . . . The commissioners as free holders of a municipality determine the award in condemnation cases despite the fact that the amount of the award could affect the amount of taxes each might have to pay as a citizen of the municipality. . . . The point seems to be that *even though it is clear there will be a financial impact upon the trier of fact, if that impact is insubstantial or insignificant, the trier of fact is not disqualified.*

Id. (Emphasis added.)

The court's reasoning in *Virginia Elec. Power Co.* is equally applicable here. The NFL's argument that a transfer out of the Central District is necessary on the basis that Los Angeles taxpayers will have a financial interest in the outcome is therefore rejected.

CONCLUSION

The NFL's motion for a change of venue prior to the conduct of voir dire proceedings is hereby denied. Three of the factors to be considered under 28 U.S.C. § 1404(a)—the plaintiff's choice of forum, the convenience of the parties, and the convenience of the witnesses—weigh heavily against a transfer. Defendants have suggested two important "interest of justice" considerations, i.e., pretrial publicity and juror prejudice. The court has concluded, however, that the effects of pretrial publicity and potential juror prejudice can be better determined after the voir dire examination of the jurors. Thus, the court will remain open to entertaining whatever motions defendants wish to make on these subjects at the conclusion of voir dire proceedings.

The Clerk of the Court shall serve copies of this Order, by United States mail, upon the attorneys of record for the parties appearing in this action.

Dated: March 17, 1981.

/s/ Harry Pregerson

Harry Pregerson
United States Circuit Judge
Sitting by Designation

APPENDIX I

Minute Order: Ruling on L.A. Coliseum Comm'n's Motion for a Separate, Non-Jury Trial of its Claim for an Injunction.

Date of Hearing: 2/24/81

The cases that control the disposition of this motion are *Beacon Theatres Inc. v. Westover,* 359 U.S. 500 (1959) and *Calnetics Corp. v. Volkswagen,* 532 F.2d 674 (9th Cir. 1976).

In *Ross v. Bernhard* 396 U.S. 531 (1970), the Supreme Court stated the *Beacon Theatres* rule as follows:

> [W]here equitable and legal claims are joined in the *same action,* there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims.

396 U.S. at 537-38 (emphasis added). *See also Myers v. United States District Court,* 620 F.2d 741, 744 (9th Cir. 1980) ("Even if the contention that Myers' counterclaim is primarily equitable were true, denying Myers a jury trial on his legal counterclaim merely because it was incidental to his equitable claim would directly contradict the principle stated in *Ross v. Bernhard, supra.*"). The legal and equitable issues here are joined in the *same action:* both the plaintiff L.A. Coliseum and the Oakland Raiders Club, a cross-claimant, have claims for both an injunction and treble damages. According to the Supreme Court in *Beacon Theatres:*

> Since the right to jury trial is a constitutional one . . . while no similar requirement protects trials by the court, [the court's] *discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial.* As this Court said in *Scott v. Neely:* "In

> the Federal courts this [jury] right cannot be dispensed with, except by the assent of the parties entitled to it; nor can it be impaired by any blending with a claim . . . of a demand for equitable relief in aid of the legal action, or during its pendency." This long-standing principle of equity dictates that *only under the most imperative circumstances,* circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of the legal issues be lost through prior determination of equitable claims.

359 U.S. at 510-11 (citations and footnotes omitted) (emphasis added). The L.A. Coliseum has presented no imperative circumstances that might require this unusual move. *See also* 359 U.S. at 508 n.10 ("Since the issue of violation of the antitrust laws often turns on the reasonableness of a restraint on trade in the light of all the facts . . . it is particularly undesirable to have some of the relevant considerations tried by one factfinder and some by another.").

The L.A. Coliseum has asserted that the Oakland Raiders would be willing to waive the collateral estoppel effect of a determination in favor of the Coliseum on the injunction issue. The Coliseum also argues that, under *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979), when two parties bring legal and equitable claims in the same action, the court may try the equitable claims first without violating the defendant's Seventh Amendment rights. *Parklane Hosiery,* however, merely established rules on the offensive use of collateral estoppel. Plaintiffs in a stockholders' class action were permitted to use a determination against the defendants in a prior SEC injunction action as collateral estoppel, partly because the stockholder plaintiffs *could not have easily joined in the prior action.* Here, however, since the Oakland Raiders Club is a necessary party and is already a defendant/cross claimant in the case, *Parklane*

Hosiery is inapplicable. The Ninth Circuit discussed a similar situation in *Calnetics Corp. v. Volkswagen,* 532 F.2d at 690 n.25:

> Calnetics did not offer to waive the collateral estoppel effect of the § 7 equitable determination on remand. But even if it had, we would be inclined to remand for a consolidated trial because of the threat of inconsistent determinations.

Therefore, in light of the foregoing authorities, and bearing in mind the overriding Seventh Amendment right of jury trial considerations discussed in *Beacon Theatres,* the L.A. Coliseum's motion for a separate, non-jury trial of its equitable claims is hereby denied.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 82-7070

DC# 78-3523 HP Central California

NATIONAL FOOTBALL LEAGUE, et al.,
Petitioners,
vs.
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,
and
LOS ANGELES MEMORIAL COLISEUM COMMISSION and OAKLAND RAIDERS, LTD.,
Real Parties in Interest.

No. 82-7071

KANSAS CITY CHIEFS, HOUSTON OILERS, et al.,
Petitioners,
vs.
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,
and
LOS ANGELES MEMORIAL COLISEUM COMMISSION and OAKLAND RAIDERS, LTD.,
Real Parties in Interest.

No. 82-7076

LOS ANGELES RAMS FOOTBALL COMPANY, et al.,
Petitioners,
vs.
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,
and
LOS ANGELES MEMORIAL COLISEUM COMMISSION and OAKLAND RAIDERS, LTD.,
Real Parties in Interest.

(Continued on following page)

No. 82-7079

OAKLAND-ALAMEDA COUNTY COLISEUM, INC., et al.,
Petitioners,
vs.
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Respondent,
and
LOS ANGELES MEMORIAL COLISEUM COMMISSION and OAKLAND RAIDERS, LTD.,
Real Parties in Interest.

[Filed March 1, 1982]

Before: HUG, FLETCHER and FARRIS, Circuit Judges

ORDER

The petitioners seek a writ of mandamus commanding the district court to order a change of venue for the trial of this action. Mandamus is a drastic remedy and is invoked only in extraordinary situations. *Bauman v. United States District Court,* 557 F.2d 650 (1977). "Only exceptional circumstances amounting to a judicial usurpation of power will justify the invocation of this extraordinary remedy." *Kerr v. United States District Court,* 426 U.S. 394, 402 (1975), *quoting Will v. United States,* 389 U.S. 90, 95 (1967). The petitioners have the burden of showing that their right to the issuance of a writ of mandamus is clear and indisputable. *Kerr,* 426 U.S. at 403; *Bauman,* 557 F.2d at 662.

The petitioners do not contend that they are entitled to relief under the statutory provisions of 28 U.S.C. § 1404(a), which provides the general standards for change of venue in civil actions. Rather, petitioners contend that they are entitled to a change of venue under the due process clause of the United States Constitution because it would not be possible to obtain a fair and impartial jury in the Central District Court of California. The district court, after carefully examining the evidence and statistics presented, concluded that the petitioners failed to demonstrate that "the

Central District, which is comprised of seven counties whose combined population numbers approximately twelve million persons will be unable to provide six fair and impartial men and women who can serve as a jury for this trial." The order of the district court further provides that the denial of the motion to change venue is without prejudice to renewal at the close of the jury selection process. This circuit has recognized that the effects of pretrial publicity can be better determined after the voir dire examination of the jurors. *Narten v. Eyman*, 400 F.2d 184, 187 (9th Cir. 1967).

The petitioners have failed to demonstrate that the extraordinary relief of mandamus is warranted.

The petitions are denied.

APPENDIX E

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

No. 78-3523-HP

LOS ANGELES MEMORIAL COLISEUM COMMISSION,
Plaintiff,

v.

NATIONAL FOOTBALL LEAGUE,
An Unincorporated Association, et al.,
Defendants.

OAKLAND RAIDERS, LTD.,
Cross-Claimant,

v.

NATIONAL FOOTBALL LEAGUE,
An Unincorporated Association, et al.,
Cross-Defendants.

FINAL DECREE

The liability and fact-of-damage issues have been tried. The jury has returned its verdicts in favor of the plaintiff and cross-claimant. The Court finds that the plaintiff and the cross-claimant are entitled to an injunction pursuant to § 16 of the Clayton Act (15 U.S.C. § 2).

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. By applying Rule 4.3 to prevent the Oakland Raiders from transferring the location of its NFL franchise to the Los Angeles Memorial Coliseum, defendants have agreed to unreasonably restrain and, in furtherance of said agreement, have

unreasonably restrained trade and commerce in violation of § 1 of the Sherman Act;

2. The NFL and its member clubs are hereby permanently enjoined from interfering with, preventing or impeding transfer of the Oakland Raiders' NFL franchise from the City of Oakland to the Los Angeles Memorial Coliseum.

3. The officers, agents, servants, employees and attorneys of each defendant, and all persons in active concert or participation with them, or any of them, are permanently enjoined from doing any act that defendants are hereinabove enjoined from doing.

4. The Court hereby determines that there is no just reason for delay in entering this final judgment on plaintiff's and cross-claimant's claim for declaratory and equitable relief, and the Court expressly directs that this final judgment be entered.

5. It is hereby FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff and cross-claimant each shall have and recover its costs of suit, including a reasonable attorneys' fee, the amount thereof to be fixed by the Court hereafter at such time as the Court shall determine.

6. Jurisdiction is retained for the purposes of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions thereof, or for the enforcement of compliance thereof, and punishment of violations thereof, and to determine the damages recoverable by plaintiff and cross-claimant against defendants.

Dated: June 14, 1982.

HARRY PREGERSON

UNITED STATES CIRCUIT JUDGE
Sitting by Designation

APPENDIX F

United States Court of Appeals

FOR THE NINTH CIRCUIT

Nos. 82-5572, 82-5573, 82-5574, 82-5664
82-5665, 83-5714, 83-5732, 83-5938

LOS ANGELES MEMORIAL COLISEUM COMMISSION, *et al.*,
Plaintiff/Appellee,

v.

NATIONAL FOOTBALL LEAGUE, etc., *et al.*,
Defendants/Cross-Defendants/Appellants,

v.

OAKLAND RAIDERS, LTD.,
Cross-Claimant/Appellee.

Before:

ANDERSON AND NELSON,
Circuit Judges,

and S. WILLIAMS,
*District Judge**

ORDER

Judges Anderson and Nelson vote to deny panel rehearing. Judge Williams would grant panel rehearing. The panel has voted to reject the suggestion for rehearing *en banc.*

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* The Honorable Spencer M. Williams, United States District Judge for the Northern District of California, sitting by designation.

The full court has been advised of the suggestion for *en banc* rehearing, and no judge of the court has requested a vote on the suggestion for rehearing *en banc*. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing *en banc* is rejected.